IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1844

CITY OF MOBILE, ALABAMA, *et al.*,

Appellants,

v.

WILEY L. BOLDEN, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States Court of Appeals for the Fifth Circuit, entered on March 29, 1978, affirming the judgment and orders of the United States District Court for the Southern District of Alabama, decided October 21, 1976. These hold the existing Commission form of government and at-large electoral system of the City of Mobile unconstitutional under the Fourteenth and Fifteenth Amendments to the U.S. Constitution as denying black citizens access to the City's political processes. The anti-corruption purposes of the Commission form of government and the equal access and

control provided to all voters by this form have never been reviewed as to constitutional compliance by this Court.

Also affirmed were orders of the District Court that the 67 year old City Government be disestablished and replaced by a strong mayor-council government elected by a single-member districts pursuant to a new City Charter imposed by the District Court. Since the Commission form of government vests in the Commissioners both legislative and specialized, individual administrative powers, the District Court's remedial order established an entire new administrative structure fixing salaries, powers and duties to operate under the mayor-council form.

By order of May 31, 1978, the District Court has set November 21, 1978, as the time for election of Mobile's new mayor-council government. However, the order provides that these elections shall be stayed if this Court grants review before that date.

Appellants submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and the substantial new and novel questions are presented under the Constitution of the United States.

OPINION BELOW

The Opinion of the Court of Appeals for the Fifth Circuit is reported in 571 F.2d 238, and that of the District Court is reported in 423 F.Supp. 384. Both Opinions are attached hereto as Appendices A and B, respectively. The Judgment of the District Court, entered on October 22, 1976, and the Order of the District Court, entered March 9, 1977, setting forth the new City Charter imposed by that Court, are both unreported. Copies are attached hereto as Appendices C

and D, respectively. The Order of the District Court, entered May 31, 1978, setting November 21, 1978 as the time for election of Mobile's new mayor-council government unless this Court sooner grants review, is set forth as Appendix E hereto.

JURISDICTION

This suit was brought as a class action in behalf of all black citizens of Mobile under 28 U.S.C. §1343(3)-(4), alleging that the present at-large system of electing City Commissioners abridges the rights of black citizens under the First, Thirteenth, Fourteenth, and Fifteenth Amendments to the U.S. Constitution; under the Civil Rights Act of 1871, 42 U.S.C. §1983; and under the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973 *et seq.*[1] The judgment of the District Court was entered on October 21, 1976; and appeal was taken to the Court of Appeals, which rendered judgment affirming the District Court on March 29, 1978. Notice of appeal was filed in the Court of Appeals June 19, 1978 (Appendix H).

The City's existing Commission Government was adopted in 1911 pursuant to State statute, Ala. Act No. 281 (1911).[2] Because the subject of this appeal is a judgment holding this local application of a State statute unconstitutional, the jurisdiction of the Supreme Court to review this decision by appeal is conferred by 28 U.S.C. §1254(2). *Dusch v. Davis*, 387 U.S. 112, 114; *Clark v. Peters*, 422 U.S. 1031. *Cf. New Orleans v. Dukes*, 472 U.S. 297, 301.

[1]Neither Court below relied upon the Voting Rights Act of 1965 for jurisdiction.

[2]This statute, as amended, is presently codified at Code of Alabama 1975 §§11-44-70 through 11-44-105 (1977).

QUESTIONS PRESENTED

1. Whether the Commission form of Government designed to fix in the head of each administrative department responsibility directly to the voters and thereby eliminate corruption and ward-heeling through direct election of each Commissioner by each voter of the City, violates the Federal Constitution because the Commission form of government cannot guarantee that one or more of the Commissioners will come from black residents who comprise one-third of the City's population?

2. Whether the holdings of the Courts below conflict with the constitutional principles established by this Court in *Whitcomb v. Chavis*, 403 U.S. 124, *White v. Regester*, 412 U.S. 755, *Washington v. Davis*, 426 U.S. 229, and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252?

3. Whether discriminatory effect has been proved when no qualified black candidate has run for the office of Commissioner under the challenged at-large city commission electoral system?

4. Whether the Courts below, in disregarding active and effective black voter and leader participation in Mobile's elections as irrelevant, have erroneously given the effects of racially polarized voting independent and controlling significance as a constitutional violation?

5. Whether the Constitution authorizes a Federal Court to legislate an entirely new form of government for the City for no purpose except that of guaranteeing that black citizens who constitute a minority of the City's voters will be elected to City offices?

STATUTES INVOLVED

This case involves the constitutionality under the Fourteenth and Fifteenth Amendments to the U.S. Constitution of Alabama Act No. 281 (1911), as locally implemented by a vote of the electorate, providing the Commission Government for the City of Mobile in 1911. This statute, as amended, is now codified at Code of Alabama 1975 §§11-44-70 through 11-44-105 (1977), set forth in pertinent part in Appendix F hereto.

Also involved is Alabama Act No. 823 (1965), set forth in Appendix G hereto.

STATEMENT

The following central facts were found by the District Court or undisputed below (see *infra*, pp. 10-12): (1) no formal or legal barriers exist to black citizens' registering to vote, voting, or running for the office of City Commissioner; (2) support of black citizens was actively sought by all candidates in recent City elections, with two of three present Commissioners having been elected with the endorsement of the City's most influential black political organization; (3) one of the three present Commissioners was elected on the strength of the black "swing vote;" and (4) only 3 blacks have ever run for the City Commission, the District Court finding that they were "young, inexperienced and mounted extremely limited campaigns" (423 F.Supp. at 388; App. B, p. 8b), and they failed even to carry predominantly black census wards.

At the outset it should be noted that at-large dilution

cases such as this one are not municipal services cases;[3] nor are they cases guaranteeing the election of blacks.[4] Finally, they are not cases justiciable under the Voting Rights Act as involving recent changes. The Courts of Appeals, particularly the Fifth Circuit, have for the last five years struggled in vain to develop a test for evaluating the quality of required constitutional black political participation short of a constitutional guarantee of election of black candidates.[5] The starting points have been this Court's decisions in *Whitcomb v. Chavis*, 403 U.S. 124 and *White v. Regester*, 412 U.S. 755. The latest effort is a quartet of cases, of which *Nevett v. Sides (Nevett II)*, 571 F.2d 209 (5th Cir. 1978) is the principal exposition, and which includes the instant case. *Nevett II* focused on the activities, principally activities in the electoral process, of white elected incumbents. This quartet of decisions does in fact guarantee that a black minority has a constitutional right to elect a black person to city office.

Heretofore at-large dilution decisions of this Court did not guarantee black voters who are a minority of the voters the constitutional right that a black win public office. These cases only guarantee black voters the right to have their

[3]The paradigm municipal services case is *Hawkins v. Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971), *aff'd on rehearing en banc*, 461 F.2d 1171 (1972).

[4]Such a desideratum is not a constitutional imperative. *Whitcomb v. Chavis*, 403 U.S. 124, 153.

[5]Both Courts below based their analysis upon the multifactor test presently controlling "dilution" cases such as this in the Fifth Circuit, *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (*en banc*), *affirmed sub. nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (but "without approval of the constitutional views" expressed in *Zimmer*, 424 U.S. at 638).

vote count in a meaningful fashion. If white officials ignore black voters, on the campaign stump and at City Hall, and if white officials resist a change from an at-large to a district electoral system in order to rely upon the white majority vote to insulate such insensitivity from electoral accountability, a constitutional violation is made out. *Nevett II*, 571 F.2d at 223.

Plaintiffs, to prevail in a Fourteenth[6] or Fifteenth[7] Amendment voting dilution case, must prove each element of electoral arrogance by white candidates and incumbents: white polarized voting which negates any electoral significance of black polarized voting; white campaigning with this effect in mind; and white officials' intentional action to create, or resist change to, an at-large system in order to perpetuate this effect.

The activities of white incumbents must evince a purposeful discrimination. *Nevett II*, 571 F.2d at 219, 221. The adoption of a "tort" standard—that the officials intend the natural consequences of their acts—facilitates proof of discriminatory purpose, required under *Washington v. Davis*, 462 U.S. 229, and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252.

As applied in this case, the *Nevett II* "tort" is not an act, but inaction: the failure of the Commissioners *sua sponte* to change their form of government to guarantee proportional representation by race.

In this case, the record reflects vigorous black political participation: endorsing white candidates, constituting the "swing" vote in the most recent contested elections, and success in dealing with white incumbent officials after election day to secure black needs.

[6]*Nevett II*, 571 F.2d at 217-18.

[7]*Nevett II*, 571 F.2d at 220-21.

The record reflects no change in the at-large electoral system of Mobile since 1911; proposed changes to a mayor-council form were defeated in referenda in 1963 and 1973. The record reflects the substantial justification and constitutional necessity of the Commission form of government which includes new factors which have never been reviewed by this Court as to their constitutional significance.

Mobile's 1970 population was 190,026, with approximately 35.4% of its residents black.

In 1911, the City adopted, pursuant to Ala. Act 281 (1911), its present three-member Commission Government. Each Commissioner performs both legislative and specific City-wide administrative functions as head of one of three municipal departments: Finance and Administration, Public Safety, and Public Works and Services (571 F.2d at 241-42,App. A, pp. 3a-4a; 423 F. Supp. 386,App. B, p. 5b).[8] Because each Commissioner administers a separate department with City-wide functions, each of constitutional necessity is elected at-large by the entire electorate.[9]

[8]Prior to 1965, assignment of administrative responsibilities was by agreement of the Commissioners among themselves. In 1965, this longstanding practice was codified under Ala. Act 823 (1965) to add one of these three functional designations to the already numbered place on the ballot for which every candidate had to announce and run, thus informing the voters of the area of municipal services for which the candidates sought responsibility.

[9]Under the Court-ordered plan, in contrast, the Mayor becomes an elected chief executive who oversees an executive branch of non-elective officials (App. D, Art. IV, Sect. 32, p. 26d), while the City Council becomes a purely legislative body which may deal with City administration "solely through the mayor" (App. D, Art. III, Sect. 16, p. 14d).

This being so, the decision of which review is sought if upheld by this Court sounds the death knell of the Commission form of government now in force in hundreds of municipalities in our nation. Any change in the administrative structure of the City would be considered submissible under the Voting Rights Act.[10] The Attorney General of the United States would perforce disapprove the change, because of longstanding objection to the at-large election requirement of the Commissioners.

This case, therefore, involves the inability of any Commission form City to alter its administrative structure[11] without Federal approval. And it in fact renders most commission forms of government unconstitutional as all commission government cities have small or large numbers of minorities among their residents.

A. Mobile's Form of Government Was Adopted With Racially-Neutral, Good Government Purposes.

Mobile's Commission Government was adopted in 1911

[10]Both the District Court and the Court of Appeals below (see 571 F.2d at 242 n. 3; App. A, p. 4a) took great pains to limit their holdings to the constitutional challenge to the at-large system in Mobile. The Attorney General had disapproved a Voting Rights Act submission (under jurisdictional protest) of the designation of functional duties of each Commissioner, on the ground solely that the Commission form "locks the city into the use of the at-large system." The Court of Appeals in this case treated the submission only as circumstantial evidence of intent to maintain the Commission form, extant since 1911. (571 F.2d at 241 n. 2; App. A, p. 3a).

[11]The Commission form is unique in electing all its administrative department heads.

It is for this reason that the remedial Order in this case is unique in its breadth. (App. D)

within the context of the progressive reform movement which prompted many other municipalities through the Nation to do likewise. (Tr. 24-25). Mobilians, like citizens of other cities swept by the reform movement, sought a city government both more efficient and business-like, and less susceptible to ward parochialism and corruption than the aldermanic or councilmanic forms. (Tr. 24-25, 36-37).

Both Courts accepted the legitimacy of at-large elections as a means of assuring City-wide perspective and representation by elected officials (423 F. Supp. at 403, App. B, p. 43b; 571 F.2d at 244, App. A, p. 9a). In the words of the Court of Appeals, the City's existing form of government was "neutral at its inception" (571 F.2d at 246, App. A, p. 13a).

B. Mobile's Electoral System Is Entirely Open To Participation By Black Citizens, Who Do In Fact Participate Actively And Exercise Significant Voting Power.

In Mobile, every phase of the electoral process—registration, voting, and qualification for candidacy—is as open to blacks as to whites. (423 F.Supp. at 387; App. B, p. 76). In Mobile, "any person interested in running for the position of city commissioner is able to do so." (423 F.Supp. at 399; App. B, p. 35b).

Beneath this "first blush" neutrality, the District Court found that "[o]ne indication that local electoral processes are not equally open is the fact that no black has ever been elected to the at-large City Commission." (423 F.Supp. at 387-88; App. B, p. 7b). Drawing upon statistical evidence that voting in the City had been polarized along racial lines (423 F.Supp. at 388-89; App. B, pp. 7b-11b), the Court found:

> "Black candidates at this time can only have a reasonable chance of being elected where they have a majority or a near majority. There is no reasonable expectation that a black candidate could be elected in a citywide election race because of race polarization. The court concludes that an at-large system is an effective barrier to blacks seeking public life." 423 F.Supp. at 388 (App. B, p. 10b).[12]

But in Mobile, no black candidate for the Commission has ever suffered defeat as a result of polarized voting. As the District Court recognized, only three blacks had sought election to the Commission; and they "were young, inexperienced, and mounted extremely limited campaigns." (423 F.Supp. at 388; App. B, p. 8b). These candidates were of such limited appeal even to black voters that they admittedly failed even to carry predominantly black census wards (Tr. 175).

In the view of the District Court, this failure of qualified black candidates even to try the political process was attributable to discouragement at their perceived chances for victory in at-large City elections (423 F.Supp. at 389; App. B, p. 11b). The District Court did not address these undisputed facts of record—often adduced through Plaintiffs' own witnesses—which clearly demonstrate that blacks do participate actively and effectively in City politics:

> 1. Commission candidates actively seek black votes, and the endorsement of the Non-Partisan Voters League ("NPVL"), the City's principal black political organization (Tr. 264, 320-22, 412-414, 539-40, 752, 824, 927, 1141).

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[12]The Court relied upon the testimony of "active candidates for public office," and upon Plaintiffs' statistical evidence of racially polarized voting (423 F. Supp. at 388; App. B, p. 9b-10b).

2. In the City's most recent elections, held in 1973,[13] two of the three present Commissioners ran and won with the endorsement of the NPVL. The third Commissioner ran unopposed.
3. One of the present Commissioners was elected on the strength of the black "swing" vote (Tr. 413-14).

The District Court did note that one past Commissioner, a white "identif[ied] with attempting to meet the needs of the black people of the city", had been elected and re-elected with black support during the over 25-year period from 1953 to 1969 (423 F.Supp. at 388; App. B, p. 9b).[14]

C. The Courts' Treatment Of The Issue Of Racial Purpose Or Intent

Although the District Court relied entirely upon the Equal Protection Clause of the Fourteenth Amendment in invalidating Mobile's at-large commission form of government (423 F.Supp. at 402-03; App. B, pp. 40b-42b), the Court held that the principle of *Washington v. Davis*, 426 U.S. 229, 242—that facially neutral government actions must be shown to be not simply racially disproportionate in impact, but the result of invidious racial purpose—had no application in a voting "dilution" case such as this (423 F.Supp. at 394-398; App. B, pp. 22b-32b). However, the Court went on to make ancillary findings involving application of a "tort standard" of proof of intent.

[13]This was the election in which the three "young, inexperienced" black candidates ran (423 F.Supp. at 388; App. B, p. 8b).

[14]Though the Court's opinion attributes his ultimate defeat in 1969 to white "backlash" and polarized voting (423 F.Supp. at 388-89; App. B, p. 9b), the testimony of the former Commissioner himself attributes his defeat to the failure of black voters to turn out at the polls (Tr. 299-304).

The District Court acknowledged that the City's government was racially neutral at its inception in 1911, but offered this remarkable "tort" analysis:

> "A legislature in 1911, less than 50 years after a bitter and bloody civil war which resulted in the emancipation of the black slaves, should have resonably expected that the blacks would not stay disenfranchised. It is reasonable to hold that the present dilution of black Mobilians is a natural and foreseeable consequence of the at-large election system imposed in 1911." 423 F.Supp. at 397 (App. B, p. 29b).

The District Court's second ancillary finding on intent involved a permutation of its tort theory applied to State legislative "inaction." Finding that the Alabama Legislature, when faced with redistricting bills, had in the past showed concern over their impact on election of black candidates, and had avoided redistricting itself until Federal court order in 1972, the Court concluded that in Mobile

> "There is a 'current' condition of dilution of the black vote resulting from intentional state legislative *inaction* which is as effective as intentional State action . . ." 423 F.Supp. at 398 (App. B, p. 31b) (emphasis original).

The Court did not suggest that, but for racial animus, the City would now have a different form of government.[15]

The Court of Appeals held, as the District Court had not, that proof of invidious racial purpose is here a necessary element under *Washington v. Davis, supra*, and subse-

[15]The Court did not rely upon the fact that in 1963 and again in 1973, the people of Mobile rejected proposals to change from the commission form to a mayor-council government. (R. 435)

quent cases of this Court following its principle.[16] Nonetheless, the Court held that the element of intent had been properly established.

First, the Court of Appeals held that the findings of the District Court under its *Zimmer* analysis "compel the inference that the [at-large commission] system has been maintained with the purpose of diluting the black vote . . ." (571 F.2d at 245; App. A, p. 12a). Second, the Court concluded that the finding that the Alabama legislature had failed to change the City's at-large Commission Government, coupled with a general legislative awareness that districting has "racial consequences," constituted "direct evidence of the intent behind the maintenance of the at-large plan." (571 F.2d at 246; App. A, p. 14a). Finally, the Court relied upon the 1965 Act designating specific functions (which the District Court had found desirable and conducive only to the voters' "intelligent choice", 423 F.Supp. at 394 n. 9; App. B, p. 21b) as further probative of an invidious "intent to maintain the plan . . ." (571 F.2d at 246; App. A, p. 14a).

The Court of Appeals also gave no indication that the City would now be operating under some other mode of government were it not for the racial animus imputed to the Legislature.

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[16]The reasoning of the Court of Appeals is developed at length in the companion case of *Nevett v. Sides* (*Nevett II*), 571 F.2d 209, 217-221, and incorporated by reference in its *Mobile* decision. 571 F.2d at 241 (App. A, p. 2a).

The District Court had rendered its decision prior to such cases as *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252; *United Jewish Organizations of Williamsburgh v. Carey*, 430 U.S. 144; *Board of School Commissioners of Indianapolis v. Buckley*, 429 U.S. 1068; and *Austin Independent School District v. United States*, 429 U.S. 990.

D. The Remedy Ordered, and Subsequent Proceedings

Because at-large elections are an integral and legally indispensable feature of the City's Commission Government, the District Court felt obligated to disestablish the City's present government, and substitute another form to "provide blacks a realistic opportunity to elect blacks to the city governing body" (423 F.Supp. at 403; App. B, p. 42b).[17]

The District Court ultimately ordered implementation of a "strong mayor-council" plan in which the 9-member council is to be elected by single-member district, with the mayor to be elected at-large (App. D, pp. 7d-8d). The Court-ordered plan is so comprehensive as to constitute a new City Charter, setting not only the form of government and electoral system, but such details as salaries and budget procedures (App. D, pp. 12d-13d, 25d, 30d-41d).

Recognizing the substantial disruption to the City and its citizens should its order be reversed on appeal, the District Court stayed its order pending appeal; and at oral argument, the Court of Appeals stayed the holding of all elections pending appeal (571 F.2d at 242; App. A, pp. 5a-6a).

Upon its affirmance of the holding and the propriety of the relief ordered below, the Court of Appeals reinstated the remedial order of the District Court and dissolved its own

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[17]The Court rejected as "undesirable" the "weak mayor-council" plan available under State law, even where elected by single-member district (423 F. Supp. at 404; App. B, p. 45b).

stay of elections (571 F.2d at 247; App. A, p. 17a).[18]

By order of May 31, 1978, the District Court has set November 21, 1978, as the time for election of Mobile's new mayor-council government. However, the order provides that these elections shall be stayed if this Court grants review before that date. (App. E, p. 3e).

THE QUESTIONS ARE SUBSTANTIAL

This case is the first to come before this Court in which an entire form of government, not merely the manner of its election, has been struck down by the Federal courts under the constitutional rubric of "dilution" of black votes.[19] Earlier cases have involved the validity of at-large or multimember districting in circumstances where the form of government was equally able to exist and function under other electoral plans such as pure single-member districting.[20]

[18]Appellants sought from the Court of Appeals a Stay of Mandate pending their seeking review in this Court. The motion was denied on April 24, 1978. Whereupon, Appellants sought by application to Mr. Justice Powell, as Circuit Justice, a Stay and Recall of Mandate pending review. This application was denied on May 15, 1978, after referral to the Court, of which only Mr. Justice Stewart and Mr. Justice Rehnquist would have granted application.

[19]Particularly in a case such as this, involving not only the form and structure of local government but the constitutional guarantees of citizen participation in selecting officials, it is especially important

> "to distinguish between issues of fact that are here foreclosed and issues which, though cast in the form of determinations of fact, are the very issues to review [for] which this Court sits." *Watts v. Indiana*, 338 U.S. 49, 51.

The instant case illustrates how far the "denial of access" test in *White v. Regester* has been carried: undisputed evidence of active and effective black political participation in an electoral system concededly neutral on its face and free of formal impediments to blacks' registering, voting, and becoming candidates is to be deemed constitutionally deficient "access to the political process" where the courts conclude that black voters are presently unable to elect black officials in an at-large electorate found to be racially polarized and the blacks are not numerous enough to elect a black.

In effect, the Courts below have given controlling constitutional significance to the effects of racially polarized voting,[21] contrary to *United Jewish Organizations v. Carey*, 430 U.S. 144, 166-67; and in so doing, have effectively required that electoral systems be so structured as to guarantee the election of minority candidates, contrary to *White v. Regester, supra*, 412 U.S. at 765-66, and *Whitcomb v. Chavis, supra*, 403 U.S. at 153. If continuation of a neutral and reasonable governmental policy or action even with awareness of its racial effects actually required the conclusion of invidious racial intent,

[20]In *White v. Regester*, 412 U.S. 755, for example, this Court for the first time upheld the disestablishment of multimember legislative districts under Fourteenth Amendment equal protection principles, affirming holdings below that Texas' electoral system "effectively excluded" Dallas County blacks and "effectively removed" Bexar County Mexican-Americans from the political process. 412 U.S. at 767, 769.

[21]In contrast to its application to the facts of this case, the Fifth Circuit's test, articulated in *Nevett II*, takes polarized voting merely as the starting point for further constitutional analysis. 571 F.2d 209, 223 n. 16.

this Court's decisions in *Washington v. Davis* and *Village of Arlington Heights* would necessary have reached different outcomes.

This case, being the first one to present to this Court the constitutionality of the commission form of local government, has national importance far beyond the City's boundaries. Hundreds of other local governments also employ commission forms of government; over 67% of all city governments and over 40% of all county governments employ at-large elections.[22] The holdings below, if affirmed, portend the substantial erosion of local governments' necessary flexibility in structuring their electoral systems to satisfy their legitimate and racially neutral need for officials with the area-wide perspective afforded by elections at-large.

A. The Courts Below Have Erroneously Created A Constitutional Guarantee Not Of Effective Political Participation, But Of Certain Political Victory.

This Court has rejected the proposition that "a white official represents his race and not the electorate as a whole and *cannot* represent black citizens." *Vollin v. Kimbel*, 519 F.2d 790, 791 (4th Cir. 1975) (emphasis original), citing *Dallas County v. Reese*, 421 U.S. 477 and *Dusch v. Davis*, 387 U.S. 112. *A fortiori*, no racial group has a constitutional right to elect minority officials "in proportion to its voting potential." *Regester, supra*, 412 U.S. at 765; *Whitcomb v. Chavis, supra*, 403 U.S. at 153; *Beer v. United States*, 425 U.S. 130, 136 n. 8. The protected right is that of effective access to, and participation in, the

[22]Appellants are aware of 80 reported dilution cases.

political process. *Chavis, supra*, 403 U.S. at 149-155; *Regester, supra*, 412 U.S. at 766.

Nor is this right impermissibly infringed where a minority finds itself consistently outvoted at the polls, even where the elections happen to be characterized by racially polarized voting. *United Jewish Organizations of Williamsburgh, Inc. v. Carey, supra*, 430 U.S. at 166; *cf. Chavis, supra*, 403 U.S. at 153. Contrary to the decision here appealed, in this Court's decisions the focus of the proper constitutional test remains minority political access and participation, *Chavis, supra*, at 149-156.

1. To disregard active and effective black political participation simply because it produces white officials is fundamental constitutional error.

The District Court, upon concluding that a minority of black citizens were presently unable to elect black City Commissioners, deemed it unnecessary to address, much less consider, the undisputed evidence of effective black political participation and electoral clout (see *supra*, pp. 10-12). Such a lapse is explicable only if the Court labored under the erroneous assumption that only black participation which led to the election of black Commissioners could indicate constitutionally sufficient access to Mobile's political process.[23]

[23]The implicit view of the District Court here was openly expressed by the Court in *Blacks United for Lasting Leadership, Inc. v. City of Shreveport*, 71 F.R.D. 623 (W.D. La. 1976), which considered similar facts — (1) open slating, (2) black vote sought by all candidates, and (3) black votes clearly influential and sometime the decisive "swing" vote — but did not

> "view this as the sort of meaningful access to political processes intended by the fourteenth Amendment as interpreted by *White [v. Regester]* . . ." 71 F.R.D. at 635.

(continued)

This is patently *not* a case in which the power of the City's black electorate has been effectively "submerged." No black candidate for the Commission has ever received the full support of the black community only to be defeated by racially polarized voting (see *supra*, p. 11). Indeed, unless one makes an official's race the litmus test of his representativeness,[24] it is clear that black Mobilians have long enjoyed representation roughly proportionate to their numbers, *i.e.*, one Commissioner indisputably responsive to black interests served continuously from 1953 to 1969; and in 1973, black voters chose the winners in the only two contested Commission seats in preference to less experienced candidates of their own race (see *supra*, pp. 11-12).

(footnote continued from preceding page)

The Fifth Circuit has remanded the *Shreveport* case for further explication of the Court's *Zimmer* findings under F.R.Civ.P. 52(a). 571 F.2d 248, 255.

If a constitutional violation can exist apart from the failure of qualified black candidates to be elected, then the evil must be as described by the Fifth Circuit in *Nevett II*:

> "Perhaps the most useful approach to analyzing the *Zimmer* criteria as they relate to the existence of intentional discrimination is to assume that an at-large scheme is being used as a vehicle for achieving the constitutionally prohibited end. The objective of such a scheme would be to prevent a group from effectively participating in elections so that the governing body need not respond to their needs. This objective would be achieved by insuring that a cohesive group remains a minority in the voting population, thus preventing that group from electing minority representatives or from holding nonminority representatives accountable." 571 F.2d at 222.

[24]In the uniform experience of Plaintiffs' own witnesses, one or more Commissioners was personally available to hear black needs or grievances; and, more often than not, this access produced positive tangible results — street lighting, paving, sewers and sidewalks. (Tr. 433-34, 572-73, 583, 621-25).

2. The courts below have erroneously given present inability of blacks, a minority of the voters, to elect black officials the status of constitutional violation, contrary to *Whitcomb v. Chavis*, *White v. Regester*, and *United Jewish Organizations of Williamsburgh, Inc. v. Carey*.

Though the absence of serious black candidacies was not attributable to any formal barrier and the Commission races are open to "any person interested" (*supra*, p. 10), the District Court accepted the bootstrap argument of Plaintiffs below—the failure of prospective black candidates even to try the City's political processes was deemed to have constitutional significance. Thus, the District Court found, there exists in Mobile "a pattern of racially polarized voting" which "discourage[s] black citizens from seeking office or being elected." (423 F.Supp. at 389; App. B, p. 11b).

The "black discouragement" theory, of course, served in lieu of proof that any black Commission candidate had ever been defeated by polarized voting, and allowed proof of the very existence of polarized voting in Commission races to depend on statistical analyses of the votes cast for white candidates. The Court of Appeals uncritically accepted this substitution of "discouragement" for the more concrete barriers[25] to black candidacy and participation required by this Court. In the electoral system upheld in *Whitcomb v. Chavis*, for example, blacks had ample reason to be discouraged at their prospects for political victory; and there is no reason to suppose that discouragement would

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[25]In *White v. Regester*, *supra*, 412 U.S. at 766-67, for example, black candadacies had been effectively blocked by a white slating organization, descendant of the white primaries.

have served in lieu of white control of the slating process[26] as a factor supporting invalidation of the electoral scheme struck down in *White v. Regester.*

Even if racially polarized voting were a political fact of life in Mobile, it would not render an otherwise neutral electoral system constitutionally infirm.[27]

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[26]In contrast to the partisan primaries requiring invalidation in *Regester,* elections are non-partisan in Mobile. This is considered an essential reform feature of the Commission form. C. Adrian & C. Press, *Governing Urban America* 221 (4th ed. 1972). The strong-mayor form, ordered by the District Court below, is characterized by partisan elections and intense mayoral political activity while in office. J. Straayer, *American State & Local Government* 238 (1974).

Nonpartisan elections, as well as at-large elections, are essential features of the council-manager form. Council-manager was the successor reform movement to the commission form. International City Management Ass'n, *Municipal Year Book* 68-69 (1976).

Therefore, this case will affect not only the Commission reform, but also the Council-Manager reform.

[27]

"Where it occurs, voting or for against a candidate because of his race is an unfortunate practice. But it is not rare: and in any district where it regularly happens, it is unlikely that any candidate will be elected who is a member of the race that is in the minority in that district. However, disagreeable this result may be, *there is no authority for the proposition that the candidates who are found racially unacceptable by the majority and the minority voters supporting those candidates, have had their Fourteenth or Fifteenth Amendment rights infringed by this process.* Their position is similar to that of the Democratic or Republican minority that is submerged year after year by the adherents to the majority party who tend to vote a straight party line." *United Jewish Organizations, supra,* 430 U.S. at 167-77 (emphasis added).

B. The Courts' Conclusion That The Maintenance Of Mobile's Existing Form Of Government Is Tainted With Invidious Racial Purpose Cannot Be Squared With *Washington v. Davis* And Other Recent Cases Of This Court Requiring Such Purpose Be Shown.

A principal error in the majority opinion's legal analysis is clearly expressed in the concurring opinion of Wisdom, J., in the companion case of *Nevett II,supra*, 571 F.2d at 232-33:

> "I agree that it is reasonable to argue, for example, that proof of the invidious effects of multi-member districts or at-large voting raises an inference, perhaps, in some cases, a strong presumption, of discriminatory purpose. That formulation is run-of-the mine, acceptable, legal semantics—in some cases. It will not cover those cases in which the voting scheme was neutral when initiated or even benign but had unintended or inadequately considered invidious effects on the voting rights of minorities. In those cases, as the majority was driven to say, the discriminatory purpose is found in maintaining the voting plan, that is, taking no affirmative curative action. This view of inaction *is* inconsistent with *Washington v. Davis.*" (emphasis original).

The role of the constitutional requirement that invidious purpose be shown is to protect the ability of government to function by facially neutral actions which serve rational and legitimate ends, but which incidentally operate with racially disproportionate impact. *Davis, supra*, 426 U.S. at 248. An inadequate standard of proof can subvert this vital rule as absolutely as its disregard.

1. The courts' tort standard of proof renders vulnerable even the continuation of facially neutral government practices supported by entirely legitimate and racially neutral policies, wherever there is general awareness of racial effect.

Both Courts below found that the City's existing form of government, together with its at-large electoral system necessarily attendant thereto, are facially neutral and were adopted for racially neutral, good-government purposes at a time when invidious racial motivations could have played no part (see *supra*, pp. 9-10). Yet the holding below deems the failure to alter Mobile's existing governmental structure (its "maintenance"), coupled with imputed legislative awareness that blacks might fare better politically under elections by single-member district, compelling proof of racial purpose.

This Court's recent decisions condemn this approach. For example, if awareness of racially disproportionate impact were equivalent to an invidious intent to accomplish such impact, the outcome of *Washington v. Davis*, where the police department continued to administer its employment test despite its awareness that a disproportionate number of black applicants failed, 426 U.S. at 252, would necessarily have been different. Similarly in *Village of Arlington Heights*, zoning officials were well aware that existing policies had the effect of maintaining the "nearly all white" status of the village, and the Court of Appeals had held that they "could not simply ignore this problem," 429 U.S. at 260. Yet this Court upheld the maintenance of these policies for reasons racially neutral, despite their exclusionary effect.

This Court has correctly observed that "viable local governments may need considerable flexibility in local arrangements" in order to meet local needs. *Abate v. Mundt*, 403 U.S. 182, 186-87 (1971). At-large electoral systems, integral and constitutionally necessary to the commission form of government used by approximately 3% of this Nation's 18,500 municipalities, further valid governmental objectives and are entitled to at least "limited deference." *Wise v. Lipscomb*, ____ U.S. ____, 98 S.Ct. 15, 17 n. 2. (Powell, J., as Circuit Justice), *staying* 551 F.2d 1043 (5th Cir. 1977), *cert. granted*, ____ U.S. ____, 98 S.Ct. 716.

This is the function of the purpose or intent as applied in *Washington v. Davis* and *Village of Arlington Heights*—to assure that government actions which are designed to further valid objectives are accorded such deference, and that those designed to further impermissible racial purposes are not. *Davis, supra*, 426 U.S. at 242-248; *Arlington Heights, supra*, 429 U.S. at 265-66.

However, where the challenged action is indeed necessary to serve valid ends, *i.e.*, here to prevent corruption, it is insufficient to show that it has been "motivated in part by a racially discriminatory purpose." *Id.* at 270 n. 21. Where such an action "would have resulted" even absent a racial purpose, it can not be fairly attributed to racial motivations and "there would be no justification for judicial interference . . ." *Id. See Davis, supra*, 426 U.S. at 253 (Stevens, J., concurring); *see also Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 285-87.

The test of invidious intent applied below stands

"deference" on its head. The City's long history of incorrupt Commission Government is anomalously used to rationalize its abolition. See 571 F.2d at 244 (App. A, p. 10a).

2. The courts' tort standard effectively imposes an affirmative duty of racially-conscious electoral restructuring upon legislatures, lest maintenance of the status quo be deemed invidiously discriminatory.

The essence of the Court of Appeals' holding is that where application of its *Zimmer* criteria indicates a current condition of voting dilution, the maintenance of such a system without affirmative corrective action compels the inference of purposeful dilution (571 F.2d at 245; App. A, p. 12a).

The creation of such an "affirmative duty" might be compared to that imposed upon school boards following this Court's second decision in *Brown v. Board of Education*, 349 U.S. 294, 299 (*Brown II*). School boards which had operated State-compelled dual school systems were

> "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Green v. School Board of New Kent County*, 391 U.S. 430, 437-38.

Yet such school systems had been adjudged unconstitutional *per se*. *Brown II, supra*, 349 U.S. at 298.

In contrast, at-large and multi-member electoral systems are clearly not unconstitutional *per se*. *Whitcomb v.*

Chavis, supra, 403 U.S. at 159-60; *White v. Regester*, 412 U.S. at 765.[28]

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[28]Even in the context of mandatory redistricting to conform to the one man-one vote principle, neither the Voting Rights Act of 1965, 42 U.S.C. §1973 *et seq.*, nor the Constitution requires legislative elimination of at-large electoral components. *Beer v. United States*, 425 U.S. 130, 138-39, 142 n.14. And, by implication, this failure to eliminate at-large seats required no inference that the reapportionment was tainted with racial purpose. *Id.*

It is equally clear that even where minority voters are in fact substantially disadvantaged in their ability to elect minority candidates by an existing electoral plan in the presence of racially polarized voting, no *per se* constitutional violation exists and there arises no constitutional or statutory duty of "affirmative action" by the legislature to correct the situation. *United Jewish Organizations, supra*, 430 U.S. at 166-67. Yet the Court's decision in effect retroactively imposes just such a duty here.

CONCLUSION

On the substantial issues of new and novel constitutional and Federal law presented herein by the commission form of government and its record in Mobile, the Court should note probable jurisdiction.

Because the District Court has ordered elections under the newly imposed mayor-council plan to take place on November 21, 1978, but has indicated that these elections will be stayed if this Court shall earlier grant review, Appellants urge that this Court note jurisdiction of this appeal as promptly in the October 1978 Term as possible.

Respectfully submitted,

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APPENDIX A

Wiley L. BOLDEN et al.,
Plaintiffs-Appellees,

v.

CITY OF MOBILE, ALABAMA, et al.,
Defendants-Appellants.

Nos. 76-4210, 77-2042.

United States Court of Appeals,
Fifth Circuit.

March 29, 1978.

Appeals from the United States District Court for the Southern District of Alabama.

Before WISDOM, SIMPSON and TJOFLAT, Circuit Judges.

TJOFLAT, Circuit Judge:

This is the second of four consolidated voting dilution cases we decide today. *See Nevett v. Sides (Nevett II),* 571 F.2d 209, 213 n.1 (5th Cir. 1978). Black citizens of Mobile, Alabama, brought this class action to challenge the constitutionality of their city's at-large method of electing its commissioners. The district court sustained the challenge, declared the city's commission government unconstitu-

tional, and ordered the establishment of a mayor-council plan requiring that councilmen be elected from single-member districts. *Bolden v. City of Mobile,* 423 F.Supp. 384 (S.D.Ala.1976). The city and its commissioners take this appeal, asserting that the district court erred in its conclusion that the at-large commission elections impermissibly diluted the votes of black Mobilians and in its ordering of the single-member plan. We find the appellants' arguments unpersuasive and therefore affirm the judgment below.

The district court's opinion sets forth the factual background of this case in detail and at length. 423 F.Supp. at 386-94. Therefore, we will discuss only the salient findings below. We also incorporate the portions of our opinion of today in *Nevett II* that explicate the legal principles applicable to voting dilution cases.[1]

I.

A city commission consisting of three members, all of whom are elected at-large, governs the City of Mobile. Government by commission of this type was established in 1911 by state law, 1911 Ala.Acts no. 281, which requires

[1]The *Nevett* opinion to which we refer is that of the second appeal in the case. We therefore denominate it *Nevett II.* The first appeal, *Nevett v. Sides (Nevett I),* 533 F.2d 1361 (5th Cir. 1976), reversed a judgment for the plaintiffs and remanded the case to the district court. On remand, the court rendered judgment holding the at-large scheme constitutional. On the second appeal, we examined at length the principles that govern dilution cases and concluded that the district court's judgment for the defendants should be affirmed. To avoid needless repetition, we adopt in this case our prior discussion of the dilution principles. In particular, we incorporate Parts I and II of the opinion.

commission candidates to run for numbered positions and win by majority vote. Commission elections are nonpartisan, and therefore there are no primaries. There is no requirement that commissioners reside in specified subdistricts.

In 1965, a specific city-wide function was assigned to each position by statute.[2] 1965 Ala.Acts no. 823. These functions

[2]On May 14, 1975, approximately three weeks before the commencement of this action, the City of Mobile submitted several statutes of the 1971 Regular Session of the Alabama Legislature to the Attorney General of the United States for approval under §5 of the 1965 Voting Rights Act, 42 U.S.C. §1973c (1970). Among these statutes was Act 429, which amended the 1965 Act that assigned the specific functions to the commission positions, 1965 Ala.Acts no. 823. The Attorney General noted that Act 823 had not been tendered to him for approval under §5, and he therefore requested that the Act be submitted.

On December 30, 1975, some seven months after the commencement of this action, the City of Mobile submitted Act 823 for the consideration of the Attorney General, although reserving the objection that the act was not subject to §5 approval. The Attorney General interposed an objection to the Act's assignment of specific functions to the commission positions because it

> locks the city into use of the at-large system of electing [its] commissioners since it would not be appropriate to permit a particular area of the City (as under a ward system of election) to have the exclusive right to elect a commissioner who would be responsible for administering functions for the whole city, for example, public safety.
>
> In view of this interpretation that [the provision] rigidifies use of the at-large system, incorporating as it does the numbered post and majority vote features, and in view of history of racial discrimination and evidence of racial bloc voting in Mobile, we are unable to conclude, as we must under the Voting Rights Act, that [the provision] will not have the effect of denying or abridging the right to vote on account of race or color.

Letter from Assistant Attorney General J. Stanley Pottinger to C.B. Arendall, Jr., Special Counsel to the City of Mobile, at 2-3 (March 2, 1976), Record, vol. 2, at 479-80.

(continued)

include the administration of the following departments: the Department of Finance and Administration, the Department of Public Safety, and the Department of Public Works and Services. Commissioners are elected for four year terms, and the mayoralty is shared equally among the commissioners during their terms.

On June 9, 1975, the appellees commenced this action to invalidate Mobile's city commission. They claimed that the at-large feature of commission races combined with the various electoral devices set out above operated to dilute their votes in violation of the first, thirteenth, fourteenth, and fifteenth amendments to the Constitution, of the Civil Rights Act, and of the Voting Rights Act.[3] The case went to trial in

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(footnote continued from preceding page)

The city has not brought suit in the District Court for the District of Columbia, as provided by §5, and therefore the function-assigning provision of Act 823 is in abeyance. As our subsequent discussion will show, the relevance of the Attorney General's objection is that it indicates the tendency of the function-assigning provision to perpetuate the at-large electoral system. The ultimate issue in this case is whether Mobile's at-large plan is being maintained with the design of diminishing black political input. The observation of the Attorney General constitutes circumstantial evidence that the legislature has recently and actively sought so to maintain the plan.

[3]Specifically, the appellees alleged violations of 42 U.S.C. §§1973, 1983, and 1985(3) (1970). The district court dismissed the §1983 claim against the city and §1985(3) claims against both the city and the commissioners. The court did not rest its final decision on the merits on any of the remaining statutory claims, but found the plan unconstitutional under the dilution precedents of the Supreme Court and this circuit, to wit, *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), and *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom. East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 294 (1976).

Although we acknowledge the general principle that federal courts should avoid decision on constitutional grounds if an adequate statutory ground is available, *e.g.*, *Wood v. Strickland*, 420 U.S. 308, 314, 95

(continued)

July of 1976, and the district court entered judgment for the appellees on October 22, 1976, ordering that the next city elections, scheduled for August, 1977, conform with a yet-to-be-determined mayor-council plan incorporating single-member council seats.[4] The court entered a remedial order on March 9, 1977, abolishing the commission government and expounding a mayor-council plan. On April 7, 1977, however, the district court stayed its injunction that had

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(footnote continued from preceding page)

S.Ct. 992, 43 L.Ed.2d 214 (1975); *Ashwander v. TVA*, 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring); *Siler v. Louisville & Nashville R.R.*, 213 U.S. 175, 191, 29 S.Ct. 451, 53 L.Ed. 753 (1909), we will not upset the district court's judgment on this basis. "The doctrine is not ironclad," *Hagans v. Lavine*, 415 U.S. 528, 546, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974), and to remand this fully litigated case would be a purposeless waste of judicial resources. The issue of constitutionality was fully developed at trial and, as the district court's thorough opinion evidences, was decisively determined in the appellees' favor under well established precedents. The statutory claim was at best problematic; this court knows of no successful dilution claim expressly founded on 42 U.S.C. §1973. Under similar circumstances, the Supreme Court has avoided an abusive application of the constitutional-decision-avoidance rule. *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 629, 94 S.Ct. 1323, 39 L.Ed.2d 630 (1974). *See also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584-85, 72 S.Ct. 863, 96 L.Ed. 1153 (1952). Moreover, a remand would not achieve the salutary objective of avoiding constitutional adjudication because we have already entertained the constitutional issues that govern this case in *Nevett II*. See note 1 *supra*. In *Nevett II* the complaint alleged no Voting Rights Act claim, and therefore we necessarily reached the constitutional issues. *See id.*, 571 F.2d at 213 n.3.

[4]The court solicited single-member plans from the parties. The plaintiffs submitted plans pursuant to pretrial order, but the defendants declined to submit a plan. The court requested that the parties submit recommendations for a three-member committee, whose duty would be to devise a detailed plan. The committee was formed and submitted a lengthy mayor-council proposal. Supp. Record, vol. 1, at 628-675.

ordered that the August elections conform to the mayor-council plan. We declined to dissolve this stay, and we stayed the holding of any city elections pending this appeal.

II

In concluding that Mobile's system of electing its city commissioners worked an unconstitutional dilution of the votes of black Mobilians, the district court relied upon the test set forth in *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 294 (1976).[5] The court determined that the appellees established all the primary indicia of dilution except for the existence of a tenuous state policy

[5]We have discussed at length in *Nevett II* the import of *Zimmer's* multifactor circumstantial evidence test for dilution. We incorporate that discussion here, and for the convenience of the reader we restate the criteria that *Zimmer* requires the district courts to consider in dilution cases. The criteria going primarily to the issue of dilution of a group's votes, the "primary" factors, include: the group's accessibility to political processes, the responsiveness of representatives to the needs of the group, the weight of the state policy behind at-large districting, and the effect of past discrimination upon the electoral participation of the group. *Zimmer*, 485 F.2d at 1305. Those criteria that may enhance the underlying dilution, the "enhancing" factors, include: the size of the district, the portion of the vote necessary for election; if the positions are not contested for individually, how many candidates an elector must vote for (i.e., whether there is an anti-single shot rule); and whether candidates must reside in sub-districts. *Id.* "By proof of an aggregation of at least some of [the *Zimmer*] factors, or similar ones, a plaintiff can demonstrate that the members of the particular group in question are being denied access." *Kirksey v. Bd. of Supervisors*, 554 F.2d 139, 143 (5th Cir.) (en banc), *cert. denied*, ___ U.S. ___, 98 S.Ct. 512, 54 L.Ed.2d 454 (1977).

behind the at-large plan. The evidence under the state policy criterion was found to be "neutral." 423 F.Supp. at 393. Under the enhancing criteria, the appellees demonstrated, and the court found, that Mobile is a large district (its 1970 population was 190,026, 35.4% of which was black), that the city has a majority vote requirement, that the commission candidates run for numbered positions, and that there are no subdistrict residency requirements. *Id.* at 393-94. We find the district court's determinations under the *Zimmer* criteria not clearly erroneous and the court's ultimate conclusion of dilution amply supported by its findings.

The district court gave careful consideration to each of the primary *Zimmer* criteria. It found a lack of black access to the political processes in Mobile. The court noted "massive official and private discrimination" prior to federal intervention in the form of the Voting Rights Act of 1965, 423 F.Supp. at 387, and found that although "[t]here are no formal prohibitions against blacks seeking office in Mobile . . ., the local political processes are not equally open to blacks." *Id.* No black had achieved election to the city commission due, in part, to racially polarized voting of an acute nature. Few blacks sought office because of the prospect of certain defeat in the at-large elections. *Id.* at 389. Although the failure of black candidates because of polarized voting is not sufficient to invalidate a plan, *United Jewish Organizations v. Carey*, 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977); *McGill v. Gadsden County Commission*, 535 F.2d 277 (5th Cir. 1976); *Bradas v. Rapides Parish Police Jury*, 508 F.2d 1109 (5th Cir. 1975); *Robinson v. Commissioners Court*, 505 F.2d 674 (5th Cir. 1974), it is an indication of lack of access to the political processes. It is one piece of the circumstantial evidence

puzzle, whose successful completion supports the illation of dilution. *See Nevett II,* 571 F.2d at 224.

The district court determined that the city commissioners have been unresponsive to the needs of blacks in Mobile. The city has employed relatively few blacks in the higher levels of city service, and the city has been enjoined by federal court order to desegregate its fire and police departments and to open city facilities to allow equal accessibility to blacks. Various city committees whose members are appointed by the commission have evidenced a severe underrepresentation of blacks. As the court concluded, "[n]o effort has been made to bring blacks into the mainstream of the social and cultural life by appointing them in anything more than token numbers." 423 F.Supp. at 390.

The court found not only that the city had been insensitive to the need for black participation in city government but also that the commission had been less responsive to black areas than white ones with respect to providing municipal services. These services included temporary relief from drainage problems, construction and resurfacing of roads, and construction of sidewalks. The court was careful to consider and weigh all the evidence.

> Although the city has not been totally neglectful, and the expense and problems are monumental, there is a singular sluggishness and low priority in meeting these particularized black neighborhood needs when compared with a higher priority of temporary allocation of resources when the white community is involved.

423 F.Supp. at 392. The court also made note of incidents of police brutality against blacks, mock lynchings, and cross burnings. The city commission reaction was found to be

sluggish, evincing "a failure by elected officials to take positive, vigorous, affirmative action in matters which are of such vital concern to the black people." *Id.*

We think the evidence fairly supports a finding of unresponsiveness. The district court's task in considering evidence under the responsiveness criterion is a singularly factual one. Given the court's attentive consideration of the voluminous evidence on this issue, we cannot find its conclusion of unresponsiveness clearly erroneous. *See Nevett II,* 571 F.2d at 225.

As to the weight of the state policy behind at-large districting of city governments, the court found that the State of Alabama had no particular preference for such schemes.[6] Given the longstanding at-large feature of Mobile's commission government, however, the court concluded that the "manifest policy of the City of Mobile has been to have at-large or multi-member districting." 423 F.Supp. at 393. We appreciate the traditional deference the federal courts have accorded local governments, and we recognize "that viable local governments may need considerable flexibility in municipal arrangements if they are to meet changing societal needs." *Abate v. Mundt,* 403 U.S. 182, 185, 91 S.Ct. 1904, 1907, 29 L.Ed.2d 399 (1971). City-wide representation is a legitimate interest, and at-large districting is ordinarily an acceptable means of preserving that interest. *See Wise v. Lipscomb,* ____ U.S. ____, 98 S.Ct. 15, 18, 54 L.Ed.2d 41 (1977), *recalling mandate and staying judgment of* 551 F.2d 1043 (5th Cir.

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[6]The court cited the elective nature of Ala. Code tit. 37, §426 (Supp. 1973), which was the subject of our opinion in *Nevett II, see id.;* 571 F.2d at 213-14 n.4, as evidence of the neutrality of Alabama's at-large policy. 423 F.Supp. at 401.

1977). But the longevity of Mobile's at-large commission government cannot insulate it from review.

> When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.

Gomillion v. Lightfoot, 364 U.S. 339, 347, 81 S.Ct. 125, 130, 5 L.Ed.2d 110 (1960); *accord, Robinson v. Commissioners Court*, 505 F.2d 674, 680 (5th Cir. 1974). We think the district court was warranted in finding that the city's interests in its at-large plan did not outweigh the strong showings by the appellees under the other *Zimmer* criteria. The aggregate of the evidence controls. *Zimmer*, 485 F.2d at 1305. Indeed, that the at-large plan has existed for over sixty-five years is wholly consistent with the court's ultimate conclusion that the plan has been maintained with the purpose of debasing black political input.

The district court found that the evidence under the last of the primary factors enunciated in *Zimmer*, whether "the existence of past discrimination in general precludes the effective participation [by blacks] in the election system," *id.*, proponderated in favor of the appellees. Blacks were effectively disenfranchised prior to the enforcement of the Voting Rights Act of 1965. A catena of federal litigation was necessary to overcome official recalcitrance in maintaining various impediments to black political participation. Although blacks are able freely to register and vote in Mobile today, the district court found that the vestiges of past discrimination "preclude the effective participation of blacks in the election system today in the at-large system of electing city commissioners." 423 F.Supp. at 393.

The district court was justified in resolving the issue of the effects of past discrimination against the appellants. It is not enough that the less subtle means of diminishing black participation have been removed. As we admonished in *United States v. Texas Education Agency*, 532 F.2d 380 (5th Cir. 1976), *vacated and remanded on other grounds sub nom. Austin Independent School District v. United States*, 429 U.S. 990, 97 S.Ct. 517, 50 L.Ed.2d 603 (1977), discriminatory official action is often clandestine and politic.

> Rather than announce his intention of violating antidiscrimination laws, it is far more likely that the state official "will pursue his discriminatory practices in ways that are devious, by methods subtle and illusive—for we deal with an area in which 'subtleties of conduct' . . . play no small part."

Id. at 388 (quoting *Holland v. Edwards*, 307 N.Y. 38, 45, 119 N.E.2d 581, 584 (1954)). Where, as here, past racial discrimination has been found to be pervasive and recent, it must be demonstrated "that enough of the incidents of the past [have] been removed, and the effects of past denial of access dissipated, that there [is] presently equality of access." *Kirksey v. Board of Supervisors*, 554 F.2d 139, 144-45 (5th Cir.) (en banc) (footnote omitted), *cert. denied*, ___ U.S. ___, 98 S.Ct. 512, 54 L.Ed.2d 454 (1977).

We need discuss only briefly the findings under the enhancing factors, since we have already outlined them. The electoral district, i.e., the City of Mobile, was found to be large; it is 142 square miles in area and had a population of 190,026 in 1970, 35.4% of which was black. The commissioners must be elected by majority vote, they run for numbered positions,[7] and they are not required to reside

[7] *See Nevett II*, 571 F.2d at 217 n.10.

in subdistricts. Thus, the findings under all the enhancing criteria enumerated in *Zimmer* (or similar ones, see note 5 *supra*) have been in favor of the appellees. The only mitigating fact is the absence of primaries for the commission races. In the aggregate, the existence of these factors compounds what was already a strong showing of dilution under the primary criteria.

The bottom line of the *Zimmer* analysis in this case is that the black voters in Mobile have prevailed under each and every criterion, with the exception of a demonstration that Mobile's policy favoring at-large commission districts is a weak one. Moreover, the finding under the policy criterion, although perhaps not providing additional impetus to the appellee's case, is consistent with the court's conclusion that the plan was maintained for discriminatory purposes.

We conclude that the district court's findings are not clearly erroneous and that these findings amply support the inference that Mobile's at-large system unconstitutionally depreciates the value of the black vote. Under our holding of today in *Nevett II*, these findings also compel the inference that the system has been maintained with the purpose of diluting the black vote, thus supplying the element of intent necessary to establish a violation of the fourteenth amendment, *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), and the fifteenth amendment, *Wright v. Rockefeller*, 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512 (1964). Although we have treated the subject of intent at length in *Nevett II*, a few additional remarks are appropriate.

III

The city ardently asserts that since the 1911 plan was enacted under "race-proof" circumstances, it is immune from constitutional attack. Blacks had been effectively disenfranchised by the Alabama constituion in 1901, and therefore the at-large plan is said to have been adopted in a context where racial considerations could not have been relevant. *See Nevett II; McGill v. Gadsden County Commission*, 535 F.2d 277 (5th Cir. 1976). The city would have us interpret *Washington v. Davis* and *Arlington Heights* to require a showing of intentional discrimination in the enactment of the plan. We squarely reject this contention in *Nevett II*, as it was rejected by the en banc court in *Kirksey v. Board of Supervisors*, 554 F.2d 139 (5th Cir.), *cert. denied*, ____ U.S. ____, 98 S.Ct. 512, 54 L.Ed.2d 454 (1977). *Kirksey* held that an innocently formulated plan that perpetuates past intentional discrimination is unconstitutional. In *Nevett II*, we noted that a plan neutral at its inception may nevertheless become unconstitutional when it is maintained for the purpose of devaluing the votes of blacks. We also demonstrated that if the aggregate of the evidence under the *Zimmer* criteria indicates dilution, then the inference arises that the plan is being maintained with the requisite intent.

The at-large scheme that has governed Mobile since 1911 is archetypal of the intentionally maintained plan we contemplated in *Nevett II*. The findings of the district court under *Zimmer's* circumstantial evidence test led the court to conclude that "[t]here is a 'current' condition of dilution of the black vote resulting from intentional state legislative *inaction* which is as effective as . . . intentional state action." 423 F.Supp. at 398 (emphasis

in original). This, the district court held, was sufficient to support a finding of unconstitutionality. We agree.

Several additional facts buttress the court's inference that the at-large plan has been maintained with discriminatory intent. We mentioned above the 1965 act that assigned specific functions to the commission positions, 1965 Ala.Acts no. 823. See note 2 *supra* and accompanying text. The Attorney General, pursuant to the authority vested in him by section 5 of the 1965 Voting Rights Act, 42 U.S.C. §1973c (1970), suspended the provisions of Act 823 that provided for specific functions. He found that the provisions tended to lock in the at-large feature of the scheme because it would be inappropriate for officials with city-wide responsibilities to be elected from single-member districts. See note 2 *supra*. This recent action by the Alabama Legislature is probative of an intent to maintain the plan by injecting additional policy grounds that would justify, and perhaps insulate, the at-large feature of all of the commission seats.

The enactment of Act 823 gains additional significance when combined with the court's finding that the legislature was acutely conscious of the racial consequences of its districting policies. As the court found, "[t]he evidence is clear that whenever a redistricting bill of any type is proposed by a county delegation member, a major concern has centered around how many, if any, blacks would be elected." 423 F.Supp. at 397. This finding constitutes direct evidence of the intent behind the maintenance of the at-large plan. *See Arlington Heights*, 429 U.S. at 268, 97 S.Ct. 555. It coincides with the conclusion of intentional discrimination evidence adduced under the *Zimmer* criteria in this case. We think that the district court has properly conducted the "sensitive inquiry into such circumstantial

and direct evidence of intent as may be available" that a court must undertake in "[d]etermining whether invidious discriminatory purpose was a motivating factor" in the maintenance or enactment of a districting plan. *Arlington Heights*, 429 U.S. at 266, 97 S.Ct. at 564.

IV

The remaining issue is the appropriateness of the district court's remedy. The court ordered the implementation of a mayor-council plan that established nine single-member council districts. The appellants contend that the court's order is violative of the tenth amendment, which provides as follows: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S.Const. Amend. X. We find this contention meritless.

The essence of the appellants' argument is that the district court, having found the city's at-large government unconstitutional, is powerless to remedy the violation. The city refused to come forward with a plan, forcing the district court to fashion a remedy. The district courts have been repeatedly admonished by the Supreme Court to avoid the employment of at-large seats in their remedial plans, unless some special circumstance requires that such seats be used. *E.g., East Carroll Parish School Board v. Marshall*, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976); *Chapman v. Meier*, 420 U.S. 1, 95 S.Ct. 751, 42 L.Ed.2d 766 (1975); *Connor v. Johnson*, 402 U.S. 690, 91 S.Ct. 1760, 29 L.Ed.2d 268 (1971). The absence of any special circumstances in this case left the district court with the remedy of implementing a single-member plan.

The exercise of the equitable power of the district court in remedying the unconstitutional infirmity in Mobile's commission plan does not contravene the tenth amendment. We have recognized the importance of flexibility in the form of local government, but flexibility is not absolute license. The abuse of local governmental power, when of the constitutional magnitude in this case, is a power "denied the States" by the Constitution within the meaning of the tenth amendment. The power to remedy the unconstitutional wrong is one "delegated to the United States by the Constitution." The Constitution expressly provides for federal court jurisdiction in claims "arising under this Constituion [or] Laws of the United States." U.S.Const. art. 3, §2. Congress has given the federal courts original jurisdiction over such claims. 28 U.S. C.A. §1331 (West Supp. 1977). Cases alleging unconstitutional infringement by a state of the right to vote are justiciable under the fourteenth amendment, *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), as are cases asserting a violation by local governments, *Avery v. Midland County*, 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 45 (1968). "The Equal Protection Clause reaches the exercise of state power however manifested, whether exercised directly or through subdivisions of the State." *Id.* at 479, 88 S.Ct. at 1118. Claims asserting abridgment of the right to vote on account of race were justiciable even before the advent of the reapportionment era ushered in by *Baker*. It was the racial gerrymander of the City of Tuskegee, Alabama, that was the subject of the fifteenth amendment claim in *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960). A concomitant to the ability of a court to hear a case is that it be able to decide the case and remedy a wrong, if found.

> Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.
>
> . . . . As with any equity case, the nature of the violation determines the scope of the remedy.

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15-16, 91 S.Ct. 1267, 1276, 28 L.Ed.2d 554 (1971).

The appellants refused to submit a plan; they cannot by their recalcitrance straight-jacket the district court. We think the remedial plan adopted by the court was within its equitable powers. The plan is a temporary measure. It will exist only until the state or the city adopts a constitutional replacement.

Having found the district court's resolution of the constitutional issues in this case to be correct, and having approved its remedial measures, we find the disposition below proper in all respects. Therefore, the judgment of the district court is AFFIRMED. The injunction of the district court ordering that elections be held in conformance with its order is hereby REINSTATED, and our stay of the conducting of municipal elections is hereby DISSOLVED.

AFFIRMED.

WISDOM, Circuit Judge, specially concurring:

I concur specially for the reasons stated in my concurring opinion in *Nevett v. Sides (Nevett II)*, 571 F.2d 209, with which this case is consolidated.

APPENDIX B

Wiley L. BOLDEN et al., Plaintiffs,

v.

CITY OF MOBILE, ALABAMA, et al.,
Defendants.

Civ. A. No. 75-297-P.

United States District Court,
S.D. Alabama, S.D.

Oct. 21, 1976.

As Amended Oct. 28, 1976.

OPINION AND ORDER

PITTMAN, Chief Judge.

This action is brought by Wiley L. Bolden and other black plaintiffs representing all Mobile, Alabama, blacks as a class, claiming the present at-large system of electing city commissioners abridges the rights of the city's black citizens under the First, Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution of the United States; under the Civil Rights Act of 1871, 42 U.S.C. §1983; and under the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973, *et seq.*

Plaintiffs alleged that the existing commission form of government elected at-large "... discriminates against black residents of Mobile in that their concentrated voting

strength is diluted and canceled out by the white majority in the City as a whole" with a consequent violation of their rights under the above Amendments to the Constitution. It is also claimed that their statutory rights under 42 U.S.C. §§1973, *et seq.* [Voting Rights Act of 1965] and 1983 [Civil Rights Act of 1871] were violated. Jurisdiction is premised upon 28 U.S.C. §1343(3) and (4).

This court has jurisdiction over the claims based on 42 U.S.C. §1983 against the City Commissioners and over the claims grounded on 42 U.S.C. §1973 against all defendants under 28 U.S.C. §1343(3)-(4) and §2201.

This cause was certified as a class action under Rule 23(b)(2), F.R.C.P., the plaintiff class being all black persons who are now citizens of the City of Mobile, Alabama.

A claim originally asserted under 42 U.S.C. §1985(3) was dismissed for failure to state a claim upon which relief can be granted.

Defendants are the three Mobile City Commissioners, sued in both their individual and official capacities.

The prayed-for relief consists of, (1) a declaration that the present at-large election system is unconstitutional, (2) an injunction preventing the present commissioners from holding, supervising, or certifying any future city commission elections, (3) the formation of a government whose legislative members are elected from single member districts, and (4) costs and attorney fees.

Plaintiffs claim that to prevail they must prove to this court's satisfaction the existence of the elements probative of voter dilution as set forth by *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), and *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), aff'd. *sub nom. East Carroll Parish School Board v.*

Marshall, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976), contending *Zimmer* is only the adoption of specified criteria by the Fifth Circuit of the *White* dilution requirements.

The defendants stoutly contest the claim of unconstitutionality of the city government as measured by *White* and *Zimmer*. They contend *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), erects a barrier since the 1911 legislative act forming the multi-member, at-large election of the commissioners was without racial intent or purpose. They assert *Washington, supra*, 96 S.Ct. at 2047-49, which was an action alleging due process and equal protection violations, held that in these constitutional actions, in order to obtain relief, proof of *intent* or *purpose* to discriminate by the defendants must be shown. Defendants state, therefore, that since the statute under which the Mobile Commission government operates was passed in 1911, with essentially all blacks disenfranchised from the electorate by the Alabama 1901 constitution, there could be no intent or purpose to discriminate at the time the statute was passed. Alternatively, however, defendants contend that if *Washington* does not preclude consideration of the dilution factors of *White* and *Zimmer*, they should still prevail because plaintiffs have not sustained their burden of proof under these and subsequent cases.

Plaintiffs' reply is to the effect that *Washington* did not establish any new constitutional purpose principle and that *White* and *Zimmer* still are applicable. If, however, this court finds *Washington* to require a showing of racial motivation at the time of passage, or merely in the retention of the statute, plaintiffs contend they should still prevail, claiming the at-large election system was designed and is

utilized with the motive or purpose of diluting the black vote. Plaintiffs claim that the discriminatory intent can be shown under the traditional tort standard.

FINDINGS OF FACT

Mobile, Alabama, is the second largest city in Alabama located at the confluence of the Mobile River and Mobile Bay in the southwestern part of the state. Mobile's 1970 population was 190,026 with approximately 35.4% of the residents black.[1] 1973 Mobile County voters statistics estimate that 89.6% of the voting age white population is registered to vote, 63.4% of the blacks are registered. (Plaintiffs' Exhibit No. 7).

Mobile geographically encompasses 142 square miles. Most of the white residents live in the southern and western parts of the city, while most blacks live in the central and northern sectors (Plaintiffs' Exhibit No. 58). Housing patterns have been, and remain, highly segregated. Certain areas of the city are almost totally devoid of black residents while other areas are virtually all black. In a recent study by the Council on Municipal Performance, using 1970 block census data, Mobile was found to be the 95th most residentially segregated of the 109 municipalities surveyed (Plaintiffs' Exhibit No. 59). According to a study performed by the University of South Alabama Computer Center for the defendants, the housing patterns in the city are so segregated it is impossible to divide the city into three

[1]Defendants' Exhibit No. 12. According to the 1970 Federal Census, the City of Mobile had a total population of 190,026 of whom 35.4% or 67,356, were non-white. The evidence is clear that there are few non-whites other than blacks.

contiguous zones of equal population without having at least one predominantly black district (Plaintiffs' Exhibit No. 60). Segregated housing patterns have resulted in concentration of black voting power.

Mobile presently operates under a three person commission-type municipal government adopted in 1911. (Ala. Act No. 281 (1911) at 330). The commissioners are elected to direct one of the following three municipal departments: Public Works and Services, Public Safety, and Department of Finance.[2]

The commissioners run on a place-type ballot and are elected at-large by the voters of Mobile. While the commission candidates must be residents of Mobile, there is not now, or has there ever been, a requirement that each commissioner reside in a particular part of the city. The evidence clearly indicates that district residence requirements with district elections would be improvident and unsound for the commission form of government.

In addition to the specific position for which a commissioner runs, each is also responsible for numerous appointments to the 46 committees operating under the auspices of the city. Some appointments are completely discretionary with the commissioner whereas committees, such as the plumbing and air conditioning boards which require members with a certain amount of expertise, are filled with a nominee suggested by the local trade

[2]When adopted in 1911, Mobile's commission government did not specify that a candidate must choose the particular commission position for which he was running. Alabama Act No. 823 (1965) at 1539, however, *inter alia*, required candidates to run for a particular numbered position with specific duties. Each commissioner holds that position during the four years tenure with the mayorality rotating between commissioners every sixteen months.

association. Often, the appointing commissioner makes his appointment from the slate of nominees presented by the particular association. This means that if the nominating association does not propose a black as a committee member, the commissioner will not appoint one. It is, however, within the commission's power to modify or change the ground rules under which appointments are made.

In *Zimmer, supra,* aff'd. *sub nom. East Carroll Parish School Board, supra* ("... but without approval of the constitutional views expressed by the Court of Appeals."), the Fifth Circuit synthesized the *White* opinion with the Supreme Court's earlier *Whitcomb v. Chavis*, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971), decision, together with its own opinion in *Lipscombe v. Jonsson*, 459 F.2d 335 (5th Cir. 1972) and set out certain factors to be considered.

Based on these factors as set out in *Zimmer, supra*, at 1305, the court makes the following findings with reference to each of the primary and enhancing factors:

LACK OF OPENNESS IN THE SLATING PROCESS OR CANDIDATE SELECTION PROCESS TO BLACKS

Mobile blacks were subjected to massive official and private racial discrimination until the Voting Rights Act of 1965. It has only been since that time that significant diminution of these discriminatory practices has been made. The overt forms of many of the rights now exercised by all Mobile citizens were secured through federal court orders together with a moral commitment of many of its dedicated white and black citizens plus the power generated

by the restoration of the right to vote which substantially increased the voting power of the blacks. Public facilities are open to all persons. Job opportunities are being opened, but the highly visible job placements in the private sector appear to lead job placements in the city government sector. The pervasive effects of past discrimination still substantially affects political black participation.

There are no formal prohibitions against blacks seeking office in Mobile.[3] Since the Voting Rights Act of 1965, blacks register and vote without hindrance. The election of the city commissioners is non-partisan, i.e., there is no preceding party primary and the candidates do not ordinarily run under party labels. However, the court has a duty to look deeper rather than rely on surface appearance to determine if there is true openness in the process and determine whether the processes "leading to nomination and election [are] ... equally open to participation by the group in question ...." *White*, 412 U.S. at 766, 93 S.Ct. at 2339. One indication that local political processes are not equally open is the fact that no black person has ever been elected to the at-large city commission office. This is true although the black population level is in excess of one-third.

In the 1960's and 1970's there has been general polarization in the white and black voting. The polarization has occurred with white voting for white and black for black if a white is opposed to a black, or if the race is between two

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[3]The qualifying fee for candidates for the city commission was found unconstitutional in *Thomas v. Mims*, 317 F.Supp. 179 (S.D.Ala. 1970). *See also U.S. v. State of Ala.*, 252 F.Supp. 95 (M.D.Ala. 1966) (three judge District Court panel) (poll tax declared unconstitutional).

white candidates and one candidate is identified with a favorable vote in the black wards, or identified with sponsoring particularized black needs. When this occurs, a white backlash occurs which usually results in the defeat of the black candidate or the white candidate identified with the blacks.

Since 1962, four black candidates have sought election in the at-large county school board election. Dr. Goode in 1962, Dr. Russell in 1966, Ms. Jacobs in 1970, and Ms. Gill in 1974. All of these black candidates were well educated and highly respected members of the black community. They all received good support from the black voters and virtually no support from whites. They all lost to white opponents in run-off elections.

Three black candidates entered the race of the Mobile City Commission in 1973. Ollie Lee Taylor, Alfonso Smith, and Lula Albert. They received modest support from the black community and virtually no support from the white community. They were young, inexperienced, and mounted extremely limited campaigns.

Two black candidates sought election to the Alabama State Legislature in an at-large election in 1969. They were Clarence Montgomery and T.C. Bell. Both were well supported from the black community and both lost to white opponents.

Following a three-judge federal court order in 1972[4] in which single-member districts were established and the state house and senate seats reapportioned, one senatorial district in Mobile County had an almost equal division between the black and white population. A black and white were in the run-off. The white won by 300 votes. There was

[4]*Sims v. Amos*, 336 F.Supp. 924 (M.D.Ala. 1972).

no overt acts of racism. Both candidates testified or asserted each appealed to both races. It is interesting to note that the white winner published a simulated newspaper with both candidates' photographs appearing on the front page, one under the other, one white, one black.

One city commissioner, Joseph N. Langan, who served from 1953 to 1969, had been elected and reelected with black support until the 1965 Voting Rights Act enfranchised large numbers of blacks. His reelection campaign in 1969 foundered mainly because of the fact of the backlash from the black support and his identification with attempting to meet the particularized needs of the black people of the city. He was again defeated in an at-large county commission race in 1972. Again the backlash because of the black support substantially contributed to his defeat.

In 1969, a black got in a run-off against a white in an at-large legislature race. There was an agreement between various white prospective candidates not to run or place an opponent against the white in the run-off so as not to splinter the white vote. The white won and the black lost.

Practically all active candidates for public office testified it is highly unlikely that anytime in the foreseeable future, under the at-large system, that a black can be elected against a white. Most of them agreed that racial polarization was the basic reason. The plaintiffs introduced statistical analyses known as "regression analysis" which supported this view. Regression analysis is a professionally accepted method of analyzing data to determine the extent of correlation between dependent and independent variables. In plaintiffs' analyses, the dependent variable was the vote received by the candidates studied. Race and income were the independent variables whose influence on the vote

received was measured by the regression. There is little doubt that race has a strong correlation with the vote received by a candidate. These analyses covered every city commission race in 1965, 1969, and 1973, both primary and general election of county commission in 1968 and 1972, and selected school board races in 1962, 1966, 1970, 1972, and 1974. They also covered referendums held to change the form of city government in 1963 and 1973 and a countywide legislative race in 1969. The votes for and against white candidates such as Joe Langan in an at-large city commission race, and Gerre Koffler, at-large county school board commission, who were openly associated with black community interests, showed some of the highest racial polarization of any elections.

Since the 1972 creation of single-member district, three blacks of the present fourteen member Mobile County delegation have been elected. Their districts are more heavily populated with blacks than whites.

Prichard, an adjoining municipality to Mobile, which in recent years has obtained a black majority population, elected the first black mayor and first black councilman in 1972.

Black candidates at this time can only have a reasonable chance of being elected where they have a majority or a near majority. There is no reasonable expectation that a black candidate could be elected in a citywide election race because of race polarization. The court concludes that an at-large system is an effective barrier to blacks seeking public life. This fact is shown by the removal of such a barrier, i.e., the disestablishment of the multi-member at-large elections for the state legislature. New single member districts were created with racial compositions that offer blacks a chance of being elected, and they are being elected.

The court finds that the structure of the at-large election of city commissioners combined with strong racial polarization of Mobile's electorate continues to effectively discourage qualified black citizens from seeking office or being elected thereby denying blacks equal access to the slating or candidate selection process.

UNRESPONSIVENESS OF THE ELECTED CITY OFFICIALS TO THE BLACK MINORITY

The at-large elected city commissioners have not been responsive to the minorities' needs. The 1970 population of the city is 64.5% white and 35.4% black.[5]

The City of Mobile is one of the larger employers in southwestern Alabama. It provided a living for 1,858 persons in 1975. 26.3% were black. It is significant to note, that if the lowest job classification, service/maintenance, were removed from our consideration, only 10.4% of the employees would be black. Likewise, removing the lowest salary classification, less than $5,900 per year, only 13.8% of all city employees are black. (Plaintiff's Exhibit No. 73).

The Mobile Fire Department has only fifteen black employees out of a total of four hundred and thirty-five employees. It took an order of this court in *Allen v. City of Mobile*, 331 F.Supp. 1134 (S.D.Ala.1971), aff'd. 466 F.2d 122 (5th Cir. 1972), cert. denied 412 U.S. 909, 93 S.Ct. 2292, 36 L.Ed.2d 975 (1973) to desegregrate the Mobile Police Department. That order set out guidelines designed to remove racial discrimination in hiring, promoting, assigning duties, and the rendering of services. The city is also operating under another court order enjoining

[5]See Footnote 1, *supra*.

racial discrimination, *Anderson v. Mobile City Commission*, Civil Action No. 7388-72-H (S.D.Ala.1973). The municipal golf course was desegregated only after litigation in federal court, *Sawyer v. City of Mobile*, 208 F.Supp. 548 (S.D.Ala.1963). This court in *Evans v. Mobile City Lines, Inc.*, Civil Action No. 2193-63 (S.D.Ala.1963), dealt with segregation in public transportation, and in *Cooke v. City of Mobile*, Civil Action No. 2634-63 (S.D.Ala.1963), dealt with segregation at the city airport.

There are 46 city committees with a total membership of approximately 482. Forty-seven are black and 435 are white. The total prior membership is 179 of which only 7 were black. (Plaintiffs' Exhibit No. 64).

The Industrial Development Board has fifteen members and no blacks and concerns itself with implementing a state law known as the "Cater Act" and the authorization of the issuance of municipal bonds for various business enterprises.

Seven committees were organized by private investment groups for the purpose of securing municipal bonding and the black-white makeup of these groups cannot be charged to the city commission. That total membership is 21. Although the membership of these seven committees cannot be charged to the city commissioners, the absence of blacks indicates the permeating results of past racial discrimination in the economic life of Mobile business. This is indicated both from the absence of blacks in the investment groups making use of municipal bonds and in that no black or black financial institutions have been able to take advantage of municipal bonds.

The Board of Adjustment, which consists of seven members, has one black. This is a critical board. It can grant variances from zoning laws and building codes

involving less than two acres. The Codes Advisory Committee consists of 17 members and no blacks. This committee codifies all building regulations for all structures in the city.

The Mobile Housing Board supervises public housing. Public housing is occupied predominantly by blacks. Fifty thousand persons, approximately 25% of Mobile's population, most of whom are black, cannot buy or rent without subsidies in the private sector, or live in substandard housing.[6] There is one black on that board out of a membership of five.

The Educational Board provides plans and means to aid its employees in a continuing education program. It has nine members, none of whom are black. The county school system has approximately 55% white and 45% black population.[7] The black drop-out rate from school is higher than whites, therefore, the continuing education is most important to them.

There are several boards, to wit, Air-Conditioning, Architectural Board, Board of Examining Engineers, and Board of Electrical Examiners, which require special skills. There are 17 members of these boards, all white. National

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[6]All of these are not in public housing. There are approximately 3,376 public housing units in the city with approximately 12,153 occupants.

[7]The school system is countywide under the supervision of the Board of School Commissioners. The school system was desegregated in the case of *Birdie Mae Davis v. Board of School Commissioners*, Civil Action No. 3003-63-H, pending, and is under the continuing supervision of this court. The city commission cannot be charged with any lack of responsiveness in the *Birdie Mae Davis* case. That case illustrates the permeation of racial discrimination in the city which constitutes two-thirds of the country's population.

census figures indicate that there are far less blacks in skilled groups than whites. The court recognizes that qualified persons should be appointed, but black membership becomes *critical* on such committees because it is through these committees that licenses are granted to skilled occupations. The absence of blacks shows an insensitivity to this particularized need.

The city has not taken affirmative action to place blacks on these critical boards.

Most of the other committees are of various social and cultural nature in the city. No effort has been made to bring blacks into the mainstream of the social and cultural life by appointing them in anything more than token numbers. There are only three blacks out of 46 members on the Bicentennial Committee and only three out of 14 on the Independence Day Celebration Committee.

Primarily because of federal funding and prodding, the city's advisory group for the mass transit technical group has three blacks and five whites.

Mobile was originally founded on the west bank of the Mobile River. The land elevation for most of the business and residential area until World War II was from zero to ten feet. There has been a substantial western expansion from the Mobile River and Bay which lies to the east. Elevation in most of these areas ranges from 40 to 50 feet, but in some of the areas it reaches as much as 160 feet.

There are three principal watersheds in the Mobile area. Three Mile Creek, traverses the northern one-third of the city draining west to east. The southern one-third of the city is drained by Dog River running from west to east. The remaining one-third, which consists of old downtown and residential Mobile, drains east to the Mobile River. Mobile has an annual rainfall of 60 or more inches per year. It is

subject to torrential downpours. All areas of Mobile, white and black, are traversed by open drainage ditches. All areas, white and black, are subject to standing water after torrential downpours with water in parts of all areas reaching the depth of one to two feet.

Mobile has a master drainage plan to be implemented over a long period of time. Unfortunately, most of the black residential areas are drained by the Three Mile Creek. The drainage system for Three Mile Creek involves issuing bonds and financing by the city which involves millions of dollars projected over several years. There has not been overt gross discrimination against the blacks in connection with the drainage project. However, almost all temporary relief in critical areas has been in the white areas. Somehow the white areas get relief with little temporary relief given the black areas.

The resurfacing and maintenance of streets in black neighborhoods significantly suffers in comparison with the resurfacing of streets in white neighborhoods. The testimony and an in-person visit of these areas by the court sustains this conclusion.

The U.S. Treasury Department, after a complaint filed by the NAACP, found racial discrimination in the city's resurfacing program. The city was advised by letter this would have to be corrected in order for the city to comply with the anti-discrimination provision of the Revenue Sharing Act. (Plaintiffs' Exhibit No. 111).

The construction of first class roads, curbs, gutters, and underground storm sewers are closely related to the drainage system. If this type of construction is done in areas subject to repeated flooding, it is a waste of money. The court observed that on the southside of Three Mile Creek near the Crichton area, which was formerly white—now

mixed or predominantly black, in the areas near the creek and subject to flooding, the streets were paved with curb and gutters while on the northside, near the black Trinity Gardens area, only two streets have low-cost paving with curbs, gutters, and underground drainage. Most of the streets are unpaved. To put in first class paving in that black area would be unwise financially, but there is a significant difference and sluggishness in the response of the city to critical needs of the blacks compared to that in the white area.

There is the same difference and sluggishness between whites and blacks in making provisional or temporary mitigating improvements pending development of the master drainage plan throughout the city.

The Williamson School, in a predominantly black area, is in a densely populated residential and neighborhood business area. The houses are on lots large enough and far enough from the streets that the placing of sidewalks could be done without great difficulty. Children from low income families frequently walk or ride bicycles to and from school. Sidewalks are critical in such areas. There was a noticeable lack of sidewalks in and near the Williamson School.

The lack of sidewalks in the Plateau area presents a different problem. The streets are narrow and the lots are small. The houses are built very close to the streets. The personal inspection by the court revealed the obvious difficulty in placing sidewalks in that area.

Blacks in Mobile, and their neighborhoods, endure a greater share of infant deaths, major crimes, T.B. deaths, welfare cases, and juvenile delinquency than do whites in their neighborhoods. In *The Neighborhoods of Mobile: Their Physical Characteristics and Needed Improvements (1969)*, the Mobile City Planning Commission in Table Q

of the Appendix, rates the 78 neighborhoods according to social blight. Nine of the 14 most blighted neighborhoods were predominantly black. The causes of this blight are multiple and it would be inaccurate to suggest that a single member district plan or the election of all black officials would correct them. Some of the causes, as the study in Table A indicates, include inadequate drainage, water, streets, sidewalks, and zoning. The city has a large responsibility in these areas. Although the city has not been totally neglectful, and the expense and problems are monumental, there is a singular sluggishness and low priority in meeting these particularized black neighborhood needs when compared with a higher priority of temporary allocation of resources when the white community is involved.

The Park and Recreation Program has generally been administered in an even-handed fashion, but a city projected park development program in the western part of the city over a period of years involving large sums of money indicates an expansion in predominantly white areas without a simultaneous consideration of the black area needs.

The black community has long complained of police brutality. A number of investigations have been made by the FBI but no indictments or evidence has been uncovered to substantiate serious charges of this nature. On March 28, 1976, a black was arrested near the scene of an alleged burglary. On April 8, an attorney for the law firm of the plaintiffs' attorney in this case reported to the Police Commissioner that there had been an alleged attempted or "mock" lynching of the black person arrested. On April 9, a meeting was held between the commission, the black non-partisan voters league, the district attorney's office, the

chief of police, and others concerning this instance.

The blacks claimed the charges were so serious that the arresting officer should be suspended immediately. It is claimed by the plaintiffs that this officer at that time had pending against him a case of alleged police brutality. The City Attorney immediately obtained some statements of the alleged "mock" lynching indicating there was substance in the charges. On April 13, that officer was discharged and seven others were suspended. Five indictments were returned in connection with the alleged "mock" lynching. The court does not deem it appropriate to make further comments concerning the details. Suffice it to say, there was a timid and slow reaction by the city commission to the alleged "mock" lynching.

The Police Department then instituted an investigation on the older pending charges. As a result of the investigation, two officers were discharged and six were suspended, all in connection with charges of police brutality but concerning unrelated incidents occurring prior to the alleged "mock" lynching.

Shortly thereafter there were twenty to thirty alleged cross burnings in Mobile and adjoining Baldwin County. Two of these were reported to have been in the City of Mobile. The lack of reassurance by the city commission to the black citizens and to the concerned white citizens about the alleged "mock" lynching and cross burnings indicates the pervasiveness of the fear of white backlash at the polls and evidences a failure by elected officials to take positive, vigorous, affirmative action in matters which are of such vital concern to the black people. The sad history of lynch mobs, racial discrimination and violence attributed to cross-burners or fellow-travelers, justifiably raises specters and fears of legal and social injustice in the minds and

hearts of black people. White people who are committed to the American ideal of equal justice under the law are also apprehensive. This sluggish and timid response is another manifestation of the low priority given to the needs of the black citizens and of the political fear of a white backlash vote when black citizens' needs are at stake.

THERE IS NO TENUOUS STATE POLICY SHOWING A PREFERENCE FOR AT-LARGE DISTRICTS

There is no clear cut *State* policy either for or against multi-member districting or at-large elections in the State of Alabama, considered as a whole. The lack of State policy therefore must be considered as a neutral factor.

In considering the State policy with specific reference to Mobile, the court finds that the city commission form of government was passed in 1911. That law provided for the election of the city commissioners at-large. This feature has not been changed although there have been some amendments to designate duties for the commissioners as well as to designate numbered places. Beginning in 1819, the year Alabama became a state in the Union, until 1911, the great majority of the time the city operated under a mayor-alderman form of government. The election for the mayor and aldermen was either at-large or from multi-member districts or wards. The manifest policy of the City of Mobile has been to have at-large or multi-member districting.

PAST RACIAL DISCRIMINATION

Prior to the Voting Rights Act of 1965, there was effective discrimination which precluded effective partici-

pation of blacks in the elective system in the State, including Mobile.

One of the primary purposes of the 1901 Constitutional Convention of the State of Alabama was to disenfranchise the blacks. The Convention was singularly successful in this objective. The history of discrimination against blacks' participation, such as the cumulative poll tax, the restrictions and impediments to blacks registering to vote, is well established.

Local discrimination in the city and the county has already been noted in connection with the lawsuits concerning racial discrimination arising in this court, to wit, the *Allen, Anderson, Sawyer, Evans,* and *Cooke, supra,* cases. *Preston v. Mandeville*, 479 F.2d 127 (5th Cir. 1973) was a countywide case involving racial discrimination of Mobile's jury selection practices. *Smith v. Allwright*, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed.2d 987 (1944) (white primaries) was applicable to Alabama and some Alabama cases of discrimination are *Davis v. Schnell*, 81 F.Supp. 872 (S.D.Ala.1949), aff'd. 336 U.S. 933, 69 S.Ct. 749, 93 L.Ed. 1093 (1949) ("interpretation" tests for voter registration), *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960) (racial gerrymandering of local government), *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) (racial gerrymandering of state government), and *U.S. v. Alabama*, 252 F.Supp. 95 (M.D.Ala.1966) (Alabama poll tax).

The racial polarization existing in the city elections has been discussed herein. The court finds that the existence of past discrimination has helped preclude the effective participation of blacks in the election system today in the at-large system of electing city commissioners.

In the 1950's and early sixties, prior to the Voting Rights Act of 1965, only a relatively small percentage of the blacks were registered to vote in the county and city.[8] Since the 1965 Voting Rights Act, the blacks have been able to register to vote and become candidates.

ENHANCING FACTORS

With reference to the enhancing factors, the court finds as follows:

(1) The citywide election encompasses a large district. Mobile has an area of 142 square miles with a population of 190,026 in 1970.

(2) The city has a majority vote requirement. Alabama Acts 281 (1911) at 343, requires election of commissioners by a majority vote.

(3) There is no anti-single shot voting provision but the candidates run for positions by place or number.[9]

(4) There is a lack of provision for the at-large candidates to run from a particular geographical subdistrict, as well as a lack of residence requirement.

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[8]In the 1950's or 1960's the impediments placed in the registration of blacks to vote was not as aggravated in Mobile County as in some counties. It was not necessary for federal voter registrars to be sent to Mobile to enable blacks to register.

[9]The influence of this enhancing factor is minimal. Voters could scarcely make an intelligent choice for the best person to serve as a commissioner to perform specific duties, such as Department of Finance, without a numbered or place system. It is this writer's opinion, born out of 15 years experience in a State judicial office subject to the electoral process, that the public's best interest is served, and it can make more intelligent choices, when candidates run for numbered positions. The choices between candidates are narrowed for the voter and they can be compared head to head.

The court concludes that in the aggregate, the at-large election structure as it operates in the City of Mobile substantially dilutes the black vote in the City of Mobile.

CONCLUSIONS OF LAW

I

There is a threshold question faced by this court in whether or not *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), is dispositive of this case so as to preclude an application of the factors determinative of voter dilution as set forth in *White, supra*, and *Zimmer, supra*, aff'd. *sub nom. East Carroll Parish School Board, supra.*

It is the defendants' contention that *Washington* makes it clear that to prevail the plaintiffs must prove that the city commission form of government was adopted for Mobile in 1911 with a discriminatory *purpose.* They further contend that since the 1901 Constitution of Alabama effectively disenfranchised the blacks, the at-large system adopted for the city commission in 1911 had no relation to minimizing or diluting the black vote because there was none. The city further contends that the commission form of government was adopted for purposes of executive efficiency and for an abandonment of the then corrupt aldermanic district elections. The plaintiffs contend that *Washington did not establish a new Supreme Court purpose* test.

The thrust of the defendants' argument is that if the 1911 statute creating the at-large city commission form of government election was neutral on its face *Washington does not* permit this court to consider other evidence or

factors and must decide the case in the city's favor. It is argued that *Washington* is a benchmark decision requiring this finding in the multi-member at-large city elections.

Washington upheld the validity of a written personnel test administered to prospective recruits by the District of Columbia Police Department. It had been alleged the test "excluded a disproportionately high number of Negro applicants." *Id.*, 426 U.S. at 233, 96 S.Ct. at 2044. The petitioners claimed the effect of this disproportionate exclusion violated their Fifth Amendment due process rights and 42 U.S.C. §1981. *Id.*, 96 S.Ct. at 2044. Evidence indicated that four times as many blacks failed to pass the test as whites. Plaintiffs contended the impact in and of itself was sufficient to justify relief. They made no claim of an intent to discriminate. The District Court found no intentional conduct and refused relief. The Circuit Court reversed, relying upon *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). *Griggs* was a Title VII action (42 U.S.C. §2000e, *et seq.*) in which the racially discriminatory impact of employment tests resulted in their invalidation by the court.

The Supreme Court in *Washington* reconciled its decision with several previous holdings, distinguished some, and expressly overruled some cases in which there were possible conclusions different from *Washington.*

They made *no reference to the recent pre-Washington* cases of its or appellate courts' voting dilution decisions dealing with at-large or multi-member versus single member districts, and, in particular, no mention was made of the cardinal case in this area, *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2342, 37 L.Ed.2d 314 (1973), nor to *Dallas v. Reese*, 421 U.S. 477, 95 S.Ct. 1706, 44 L.Ed.2d 312 (1975), and *Chapman v. Meier*, 420 U.S. 1, 95 S.Ct. 751,

42 L.Ed.2d 766 (1975), nor to *Zimmer*, which the Court had affirmed only a few months before, nor to *Turner v. McKeithen*, 490 F.2d 191 (5th Cir. 1975). No reference was made to *Fortson v. Dorsey*, 379 U.S. 433, 85 S.Ct. 498, 13 L.Ed.2d 401 (1965), to *Reynolds*, nor to *Whitcomb. Whitcomb*, 403 U.S. at 143, 91 S.Ct. 1858, 29 L.Ed.2d 363, recognized that in an at-large election scheme, a showing that if in a particular case the system operates to minimize or cancel out the voting strength of racial or political elements, the courts can alter the structure. Had the Supreme Court intended the *Washington* case to have the far reaching consequences contended by defendants, it seems to this court reasonable to conclude that they would have made such an expression.

There are several reasons which may be plausibly advanced as to why the *Washington* Court did not expressly overrule nor discuss these cases. Courts are not prone to attempt to decide every eventuality of a case being decided or its effect on all previous cases. The Court may have desired that there be further development of the case law in the district and circuit courts before commenting on the application of *Washington* to this line of cases. The cases may be distinguishable and reconcilable with the expressions in *Washington.* Or, it may not have been the intention of the *Washington* Court to include these cases within the ambit of its ruling.

Washington spoke with approval of *Wright v. Rockefeller*, 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512 (1964), setting out the "intent to gerrymander" requirement established in *Wright. Washington*, 426 U.S. at 240, 65 S.Ct. at 2047-48.

Wright was the direct descendant of *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110

(1960). These two cases involved racial gerrymandering of political lines. *Gomillion* dealt with an attempt by the Alabama legislature to exclude most black voters from the municipal limits of Tuskegee so whites could control the elections. The Court found that the State of Alabama impaired the voting rights of black citizens while cloaking it in the garb of the realignment of political subdivisions and held there was a violation of the Fifteenth Amendment. *Gomillion, supra*, 364 U.S. at 345, 81 S.Ct. 125. There was no direct proof of racial discriminatory intent. Justice Stevens in his concurring opinion noted with approval, "... when the disproportion[ate impact] is as dramatic as in *Gomillion*, ..., it really does not matter whether the standard is phrased in terms of *purpose* or *effect.*" *Washington, supra*, 426 U.S. at 254, 96 S.Ct. at 2054.[10] (emphasis added).

Wright dealt with the issue of congressional redistricting of Manhattan. The plaintiffs alleged racially motivated districting. The congressional lines drawn created four districts. One had a large majority of blacks and Puerto Ricans. The other three had large white majorities. The court held the districts were not unconstitutionally gerrymandered upon the finding that "... the New York legislature was [not] motivated by racial considerations or

[10]In *Paige v. Gray*, 538 F.2d 1108 (5th Cir. 1976), black citizens of Albany, Georgia, brought an action to invalidate the at-large system of electing city commissioners. At 1110 n.3, the court noted the above quote by Justice Stevens, but in the body of the opinion expressed concern with unlawful motive for discriminatory purpose as required by *Washington.* However, at 1110, the court stated "the validity of Albany's change from a ward to an at-large system can best be handled by applying the multifactor test enunciated in ... *White v. Regester* ... and *Zimmer v. McKeithen.*" *Paige*, at 1111, stated *Zimmer* still "sets the basic standard in this circuit."

in fact drew the districts on racial lines." *Wright*, 376 U.S. at 56, 84 S.Ct. at 605. This set forth the principle that in gerrymandering cases in order for the plaintiffs to obtain relief they must show racial motivation in the drawing of the district lines.

Washington then quoted with approval from *Keyes v. School District No. I*, 413 U.S. 189, 93 S.Ct. 2686, 37 L.Ed.2d 548 (1973), indicating a distinction or reconciliation of that case with *Washington*. There had not been racial purpose or motivation *ab initio* in *Keyes*. *Keyes* was a Denver, Colorado, school desegregation case. Denver schools had never been segregated by force of state statute or city ordinance. Nevertheless, the majority found that the *actions* of the School Board during the 1960's were sufficiently indicative of "... [a] *purpose* or *intent* to segregate" and a finding of *de jure* segregation was sustained. *Keyes*, 413 U.S. at 205, 208, 93 S.Ct. 2686, 2697. The Court held that to find overt racial considerations in the *actions* of government officials is indeed a difficult task.[11]

Washington further commented:

> "... an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." *Washington, supra*, 426 U.S. at 242, 96 S.Ct. at 2049.

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[11]In another Fifth Circuit case it was held that if an official is motivated by such wrongful intent, he or she

> "... will pursue his discriminatory practices in ways that are devious, by methods subtle and elusive—for we deal with an area in which 'subtleties of conduct ... play no small part'." *U.S. v. Texas Ed. Agency*, 532 F.2d 380, 388 (5th Cir. 1976) (Austin II) (school desegregation).

The plaintiffs contend that *Washington's* discussion with approval of the *Keyes* case permits the application of the "tort" standard in proving intent. In his concurring opinion, Justice Stevens discussed this point:

> "Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For *normally the actor is presumed to have intended the natural consequences of his deeds.* This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decision-making, and of mixed motivation." *Washington, supra*, 426 U.S. at 253, 96 S.Ct. at 2054 (emphasis added).

The plaintiffs contend this circuit's use of the tort standard of proving intent squares with the above statements. This circuit for several years has accepted and approved the tort standard as proof of segregatory intent as a part of state action in school desegregation findings. *Morales v. Shannon*, 516 F.2d 411, 412-13 (5th Cir. 1975), *cert. den.* 423 U.S. 1034, 96 S.Ct. 566, 46 L.Ed.2d 408 (1975).

Recently, citing *Morales, supra, Cisneros v. Corpus Christi Independent School District*, 467 F.2d 142 (5th Cir. 1972) (en banc), *cert. den.* 413 U.S. 920, 93 S.Ct. 3053, 37 L.Ed.2d 1041 (1973), *reh. den.* 414 U.S. 881, 94 S.Ct. 3015, 38 L.Ed.2d 1249 (1973), and *United States v. Texas Educational Agency*, 467 F.2d 848 (5th Cir. 1972) (en banc) (Austin I), the Fifth Circuit in *U.S. v. Texas Education Agency* (Austin Independent School District) 532 F.2d 380 (5th Cir. 1976) (Austin II) squarely addressed the meaning of discriminatory intent in the following language:

"Whatever may have been the originally intended meaning of the tests we applied in *Cisneros* and *Austin I* [*U.S. v. Texas Education Agency, supra*], we agree with the intervenors that, after *Keyes*, our two opinions must be viewed as incorporating in school segregation law the ordinary rule of tort law that a person intends the natural and foreseeable consequences of his actions.

* * *

Apart from the need to conform *Cisneros* and *Austin I* to the supervening *Keyes* case, there are other reasons for attributing responsibility to a state official who should reasonably foresee the segregative effects of his actions. First, it is difficult—and often futile—to obtain direct evidence of the official's intentions . . . Hence, courts usually rely on circumstantial evidence to ascertain the decision-makers' motivations." *Id.* at 388.

This court in its findings of fact has held that when the 1911 statute was enacted, at a time the blacks were disenfranchised, the statute on its face was neutral. This is in line with Fifth Circuit opinions, *McGill v. Gadsden Co. Commission*, 535 F.2d 277 (5th Cir. 1976), *Wallace v. House*, 515 F.2d at 633 (5th Cir. 1975), vacated 425 U.S. 947, 96 S.Ct. 1721, 48 L.Ed.2d 191 (5th Cir. 1976), affirmed the District Court and *Taylor v. McKeithen*, 499 F.2d 893, 896 (5th Cir. 1974). However, in the larger context, the evidence is clear that one of the primary purposes of the 1901 constitutional convention was to disenfranchise the blacks.[12]

[12]The history of Alabama indicates that there was a populist movement at that time which sought to align the blacks and poor whites. The Bourbon interests of the State sought to disenfranchise the poor whites along with the blacks but were unsuccessful, excepting the cumulative feature of the poll tax. They were singularly successful in disenfranchising the blacks.

Therefore, the legislature in 1911 was acting in a race-proof situation. There can be little doubt as to what the legislature would have done to prevent the blacks from effectively participating in the political process had not the effects of the 1901 constitution prevailed. The 1901 constitution and the subsequent statutory schemes and practices throughout Alabama, until the Voting Rights Act of 1965, effectively disenfranchised most blacks.

A legislature in 1911, less than 50 years after a bitter and bloody civil war which resulted in the emancipation of the black slaves, should have reasonably expected that the blacks would not stay disenfranchised. It is reasonable to hold that the present dilution of black Mobilians is a natural and foreseeable consequence of the at-large system imposed in 1911.

Under Alabama law, the legislature is responsible for passing acts modifying the form of city and county governments. Mobile County elects or has an effective electoral voice in the election of eleven members of the House and three senators. The state legislature observes a courtesy rule, that is, if the county delegation unanimously endorses local legislation the legislature perfunctorily approves all local county legislation. The Mobile County Senate delegation of three members operates under a courtesy rule that any one member can veto any local legislation. If the Senate delegation unanimously approves the legislation, it will be perfunctorily passed in the State Senate. The county House delegation does not operate on a unanimous rule as in the Senate, but on a majority vote principle, that is, if the majority of the House delegation favors local legislation, it will be placed on the House calendar but will be subject to debate. However, the proposed county legislation will be

perfunctorily approved if the Mobile County House delegation unanimously approves it. The evidence is clear that whenever a redistricting bill of any type is proposed by a county delegation member, a major concern has centered around how many, if any, blacks would be elected. These factors prevented any effective redistricting which would result in any benefit to the black voters passing until the State was redistricted by a federal court order.[13] There are now three blacks on the eleven member House legislative delegation. This resulted in passage in the 1975 legislature of a bill doing away with the at-large election of the County Board of School Commissioners and creating five single member districts. This was promptly attacked by the all-white at-large elected County School Board Commission in the State court. The act was declared unconstitutional for failure to have met constitutional requirements concerning advertisement.

This natural and foreseeable consequence of the 1911 Act, black voter dilution, was brought to fruition in 50 odd years, the middle 1960's, and continues to the present. This court sees no reason to distinguish a school desegregation case from a voter discrimination case. It appears to this court that the evidence supports the tort standard as advocated by the plaintiffs. However, this court prefers not to base its decision on this theory. This court deems it desirable to determine if the far-reaching consequence of *Washington* as advanced by the defendants is correct without regard to *Keyes*. This court is unable to accept such a broad holding with such far-reaching consequences.

The case *sub judice* can be reconciled with *Washington*. The *Washington* Court, in Justice White's majority

[13]*Sims v. Amos*, 336 F.Supp. 924 (M.D.Ala. 1972).

opinion, included the following:

> "This is not to say that the necessary discriminatory racial purpose must be express or appear on the face of the statute, or that a law's disproportionate impact is irrelevant in cases involving Constitution-based claims of racial discrimination. A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race. *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed.220 (1886)." *Washington, supra*, 426 U.S. at 241, 96 S.Ct. at 2048.

To hold that the 1911 facially neutral statute would defeat rectifying the invidious discrimination on the basis of race which the evidence has shown in this case would fly in the face of this principle.

It is not a long step from the *systematic exclusion of blacks* from juries which is itself such an "unequal application of the law ... as to show intentional discrimination," *Akins v. Texas*, 325 U.S. 398, 404, 65 S.Ct. 1276, 1279, 89 L.Ed. 1692 (1945), and the deliberate systematic denials to people from juries because of their race, *Carter v. Jury Commission*, 396 U.S. 320, 90 S.Ct. 518, 24 L.Ed.2d 549 (1970), *Cassell v. Texas*, 339 U.S. 282, 70 S.Ct. 629, 94 L.Ed. 839 (1950), *Patton v. Mississippi*, 332 U.S. 463, 68 S.Ct. 184, 92 L.Ed. 76 (1947), cited in *Washington, supra*, 426 U.S. at 239-40, 96 S.Ct. at 2047, to a present purpose to dilute the black vote as evidenced in this case. There is a "current" condition of dilution of the black vote resulting from intentional state legislative *inaction* which is as effective as the intentional state action referred to in *Keyes. Washington, supra*, 426 U.S. at 240, 96 S.Ct. at 2048.

More basic and fundamental than any of the above approaches is the factual context of *Washington* and this case. Initial discriminatory purpose in employment and in redistricting is entirely different from resulting voter dilution because of racial discrimination. *Washington's* failure to expressly overrule or comment on *White, Dallas, Chapman, Zimmer, Turner, Fortson, Reynolds,* or *Whitcomb*, leads this court to the conclusion that *Washington* did not overrule those cases nor did it establish a new Supreme Court *purpose* test and require initial discriminatory purpose where voter dilution occurs because of racial discrimination.

II

In order for this court to grant relief as prayed for by plaintiffs, it must be shown that the political process was not open equally to the plaintiffs as a result of dilution of voting strength and consequently the members of the class had less opportunity to participate in the political process and elect representatives of their choice. *Chapman*, 420 U.S. at 18, 95 S.Ct. 751, and *Whitcomb.* "Access to the political process and not [the size of the minority] population" is the key determinant in ascertaining whether there has been invidious discrimination so as to afford relief. *White*, 412 U.S. at 766, 93 S.Ct. 2332; *Zimmer*, 485 F.2d at 1303.

The idea of a democratic society has since the establishment of this country been only a supposition to many citizens. The Supreme Court vocalized this realization in *Reynolds* where it formulated the "one person-one vote" goal for political elections. The precepts set forth in *Reynolds* are the substructure for the present voter dilution

cases, stating that "every citizen has an inalienable right to full and effective participation in the political processes . . ." *Reynolds*, 377 U.S. at 565, 84 S.Ct. at 1383. The Judiciary in subsequent cases has recognized that this principle is violated when a particular identifiable racial group is *not* able to fully and effectively participate in the political process because of the system's structure.

Denial of full voting rights range from outright refusal to allow registration, *Smith v. Allwright, supra*, to racial gerrymandering so as to exclude persons from voting in a particular jurisdiction, *Gomillion v. Lightfoot, supra*, to establishing or maintaining a political system that grants citizens all procedural rights while neutralizing their political strength, *White v. Regester, supra.* The last arrangement is maintained by the City of Mobile.

Essentially, dilution cases revolve around the "quality" of representation. *Whitcomb*, 403 U.S. at 142, 91 S.Ct. 1858. The touchstone for a showing of unconstitutional racial voter dilution is the test enunciated by the Supreme Court in *White,* 412 U.S. at 765, 93 S.Ct. at 2339; Whether "multi-member districts are being used invidiously to cancel out or minimize the voting strength of racial groups." In *White*, for slightly different reasons in each county, the Supreme Court found that the multi-member districts in Dallas and Bexar Counties, Texas, were minimizing black and Mexican-American voting strength.

Attentive consideration of the evidence presented at the trial leads this court to conclude that the present commission form of government in the City of Mobile impermissibly violates the constitutional rights of the plaintiffs by improperly restricting their access to the political process. *White*, 412 U.S. at 766, 93 S.Ct. 2332; *Whitcomb*, 403 U.S. at 143, 91 S.Ct. 1858. The plaintiffs

have discharged the burden of proof as required by *Whitcomb.*

This court reaches its conclusion by collating the evidence produced and the law propounded by the federal appellate courts. The controlling law of this Circuit was enunciated by Judge Gewin in *Zimmer*, which closely parallels *Whitcomb* and *White.*[14] The *Zimmer* court, in an *en banc* hearing, set forth four primary and several "enhancing" factors to be considered when resolving whether there has been impermissible voter dilution. The primary factors are:

> "... a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multi-member or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case [for relief] is made." *Zimmer* at 1305. (footnotes omitted).

The enhancing factors include:

> "a showing of the existence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistricts." *Ibid.* (footnotes omitted).

1. LACK OF OPENNESS IN THE SLATING PROCESS OR CANDIDATE SELECTION PROCESS TO BLACKS

First, the political parties in the City of Mobile do not

[14]See also *Paige v. Gray*, 538 F.2d 1108 (5th Cir. 1976).

slate candidates per se; rather, any person interested in running for the position of city commissioner is able to do so. There has been little evidence to a "party" supporting one candidate or another in the city races.

The system at first blush appears to be neutral, but consideration of facts beneath the surface demonstrate the *effects* which lead the court to conclude otherwise. No black has ever been elected city commissioner in Mobile. The evidence indicates that black politicians who have previously been candidates in at-large elections and would run again in the smaller single member districts, shy away from city at-large elections. One of the principal reasons is the polarization of the white and black vote. The court is concerned with the effect of lack of openness in the electoral system in determining whether the multi-member at-large election system of the city commissioners is invidiously discriminatory.

In *White*, the Supreme Court expressed concern with any type of barrier to effective participation in the political process. *Zimmer*, 485 F.2d at 1305 n.20, expressed its view in this language: "the standards we enunciate today are applicable whether it is a specific law or a custom or practice which causes diminution of a minority voting strength."

There is a lack of openness to blacks in the political process in city elections.

2. UNRESPONSIVENESS OF THE ELECTED CITY OFFICIALS TO THE BLACK MINORITY

It is the conclusion of the court that the city-wide elected municipal commission form of government as practiced in

the City of Mobile has not and is not responsive to blacks on an equal basis with whites; hence there exists racial discrimination. Past administrations not only acquiesced to segregated folkways, but actively enforced it by the passage of numerous city ordinances. There have been orders from this court to desegregate the police department, the golf course, public transportation, the airport, and which attack racial discrimination in employment.[15]

There has been a lack of responsiveness in employment and the use of public facilities. It is this court's opinion that leadership should be furnished in non-discriminatory hiring and promotion by our government, be it local, state, or federal.[16]

In addition to the refusal of officials to voluntarily desegregate facilities, the city commissioners have failed to

[15]The County School Board, which operates both in the city and county, has been in federal court continuously since 1963 to effect meaningful desegregation. *Davis v. Mobile County School Board*, Civil Action No. 3003-63 (S.D.Ala.1963). Incidentally, during the course of the court's continuing jurisdiction in *Davis*, there have been fifteen or more appeals to the Fifth Circuit.

[16]*Norman R. McLaughlin, etc. v. Howard H. Callaway, et al.*, 382 F.Supp. 885, 895 (S.D.Ala.1974) stated:

> "It is only fitting that the government take the lead in the battle against discrimination by ferreting out and bringing an end to racial discrimination in its own ranks."

Mobile has no ordinances proclaiming equal employment opportunity, either public or private, to be its policy. There are no non-discriminatory rental ordinances. On the one hand, the federal courts are often subjected to arguments by recalcitrant state and local officials of the encroachment of the federal bureaucracy and assert Tenth Amendment violations—while making no mention that were it not for such "encroachment" citizens would not have made the progress they have to fulfillment of equal rights. Recent history bears witness to this proposition.

appoint blacks to municipal committees in numbers even approaching fair representation. Appointments to city committees are important not only to obtain diverse opinions from all parts of the community and share fairly what power the committees have, but for the black community it would open parts of the governmental processes to those to whom they have for so long been denied. The city commission's custom or policy of appointing disproportionately few blacks to committees is a clear reflection of the at-large election system's dilution of blacks' influence and participation. The commissioners appoint citizens from their neighborhoods and constituencies, which are virtually all white. The commissioners have relatively less contact with the black community and hence are not as likely to know of black citizens who are qualified and interested in serving on committees. Recognizing the admonitions of the courts when judicially dealing with discretionary appointments, *Mayor of the City of Philadelphia v. Educational Equality League*, 415 U.S. 605, 94 S.Ct. 1323, 39 L.Ed.2d 630 (1974), and *James v. Wallace*, 533 F.2d 963 (5th Cir. 1976), that it is not within the authority of this court to order particular appointments, it is this court's view that the failure to appoint a significant number of blacks is indicative of a lack of responsiveness.

3. NO TENUOUS STATE POLICY SHOWING A PREFERENCE FOR AT-LARGE DISTRICTS

The Alabama legislature has offered little evidence of a preference one way or the other for multi-member or at-large districts in cities the size of Mobile. For example, Title 37, §426, *Code of Alabama* (Supp. 1973), provides

for a number of various forms of either multi-member or single-member municipal governments, with a municipality's option often dictated by its size. Mobile, with a population exceeding 50,000 persons, is allowed by Title 37, §426, to have a mixture of single-member and at-large aldermen. Consequently, this court finds state policy regarding multi-member at-large districting as neutral.

Mobile itself has had a mixed history concerning its local preference for representative districting, particularly prior to the adoption of the commission government in 1911. Elections were usually at-large but at times there were some ward residency requirements and multi-member ward elections. Since 1911, however, the city commission has been elected in citywide at-large elections.

4. PAST RACIAL DISCRIMINATION

It is this court's opinion that fair and effective participation under the present electoral system is, because of its structure, difficult for the black citizens of Mobile. Past discriminatory customs and laws that were enacted for the sole and intentional purpose of extinguishing or minimizing black political power is responsible. The purposeful excesses of the past are still in evidence today. Indeed, Judge Rives, writing for a three-judge finding the Alabama poll tax to be unconstitutional, stated forcefully:

> " 'The long history of the Negroes' struggle to obtain the right to vote in Alabama has been trumpeted before the Federal Courts of this State in great detail. * * If this Court ignores the long history of racial discrimination in Alabama, it will prove that justice is both blind and deaf.' We would be blind with indifference, not impartiality, and deaf with intentional disregard of the cries for equality of men before the law." *U.S. v. State of Alabama*, 252 F.Supp. at 104 (M.D.Ala.1966) [citing *Sims v. Baggett*, 247 F.Supp. 96, 108-09 (M.D.Ala.1965)].

Without question, past discrimination, some of which continues to today as evidenced by the orders in several lawsuits in this court against the city and county, and demonstrated in the lack of access to the selection process and the city's unresponsiveness, contributes to black voter dilution.

5. ENHANCING FACTORS

Zimmer, in addition to enumerating four substantial criteria in proving voter dilution, listed four "enhancing factors" that should be considered as proof of aggravated dilution.

a. *Large Districts.* The present at-large election system is as large as possible, i.e., the city. The city with an area of 142 square miles, and more than 190,000 persons, can reasonably be divided into election districts or wards. It is common knowledge that numerous towns and cities of much less size in Alabama are so divided and function reasonably well. It is large enough to be considered large within the meaning of this factor.

b. *Majority Vote Requirements.* Alabama Acts No. 281 (1911) at 343, which established the Mobile commission form of government, required the election of the representatives by a majority vote.

c. *Anti-single Shot Voting.* There is in Act No. 281 "no anti-single shot" voting provisions nor is there one in the current codification, [Ala.Code, Title 37, §89, *et seq.*] or in

Alabama Acts No. 823 (1965) at 1539.[17]

The numbered place provision of Act 823 (or, if Act 823 is invalid, Ala.Code, Title 37, §94) has to some extent the same result. At least in part, the practical result of an anti-single shot provision obtains in Mobile.[18]

d. *Lack of Residency Requirement.* Act 281 does not contain any provision requiring that any commissioners reside in any portion of town.[19]

III

The court has made a finding for each of the *Zimmer* factors, and most of them have been found in favor of the plaintiffs. The court has analyzed each factor separately, but has not counted the number present or absent in a "score-keeping" fashion.

The court has made a thoughtful, exhaustive analysis of the evidence in the record ". . . [paying] close attention to the facts of the particular situations at hand," *Wallace*, 515 F.2d at 631, to determine whether the minority has suffered

[17]An "anti-single shot" provision obtained in all city elections from 1951 to 1961, see Ala. Code, Title 37, §33(1), but was repealed 9/15/61.

[18]See footnote 9, supra.

[19]To impose residency requirements under Act 823, the designation of duty provision (or if Act 823 is invalid, Ala.Code, Title 37, §94, the numbered position provision), as well as the 1911 establishment of at-large electior. of city commissioners would at a minimum be anomalous and probably unconstitutional. City commissioners in command of particular functions, such as public safety, residing and being elected from one particular side of town, would be accountable to only one-third of the population notwithstanding jurisdiction over the entire city. *B.U.L.L. v. City of Shreveport*, 71 F.R.D. 623 (W.D.La.1976), also expresses this view.

an unconstitutional dilution of the vote. This court's task is not to tally the presence or absence of the particular factors, but rather, its opinion represents ". . . a blend of history and an intensely local appraisal of the design and impact of the . . . multi-member district [under scrutiny] in light of past and present reality, political and otherwise." *White*, 412 U.S. at 769-70, 93 S.Ct. at 2341.

The court reaches its conclusion by following the teachings of *White, Dallas v. Reese*, 421 U.S. 477, 480, 95 S.Ct. 1706, 44 L.Ed.2d 312 (1975), *Zimmer, Fortson*, and *Whitcomb, et al.*

The evidence when considered under these teachings convinces this court that the at-large districts "operate to minimize or cancel out the voting strength of racial or political elements of the voting population." *Whitcomb*, 403 U.S. at 143, 91 S.Ct. at 1869, and *Fortson*, 379 U.S. at 439, 85 S.Ct. 498, and "operates impermissibly to dilute the voting strength of an identifiable element of the voting population,". *Dallas*, at 480, 95 S.Ct. at 1708. The plaintiffs have met the burden cast in *White* and *Whitcomb* by showing an aggregate of the factors cataloged in *Zimmer*.

In summary, this court finds that the electoral structure, the multi-member at-large election of Mobile City Commissioners, results in an unconstitutional dilution of black voting strength. It is "fundamentally unfair", *Wallace*, 515 F.2d at 630, and invidiously discriminatory.

The Supreme Court has laid down the general principle that "when district courts are forced to fashion apportionment plans, single-member districts are preferable to large multi-member districts as a general matter." *Connor v. Johnson*, 402 U.S. 690, 692, 91 S.Ct. 1760, 1762, 29 L.Ed.2d 268 (1971). The Court reaffirmed this twice in the

last term. *East Carroll Parish School Board*, and *Wallace, supra.* Once the racial discriminatory evil has been established, as it was in *White*, the dilution occasioned by the multi-member at-large election requires the disestablishment of the multi-member at-large election and the obvious remedy is to establish single member districts.

This court does not endorse the idea of quota voting or elections, nor of a weighted vote in favor of one race to offset racial prejudice or any other adversity. However, when the electoral structure of the government is such, as in this case, that racial discrimination precludes a black voter from an effective participation in the election system, a dilution of his and other black votes has occurred.

The moving spirit present at the conception of this nation, "all men are created equal," will not rest and the great purpose of the Constitution to "establish Justice, insure domestic Tranquility, . . . and secure the Blessings of Liberty to ourselves and our Posterity . . . ." will be only a dream until every person has an opportunity to be equal. To have this opportunity, every person must be treated equally. This includes being treated equally in the electoral process.

A city government plan which includes small single-member districts will provide blacks a realistic opportunity to elect blacks to the city governing body. No such realistic opportunity exists as the city government is presently structured. A mayor-council plan with single-member council districts, would afford such an opportunity. Blacks effective participation in the elective system will have the salutary effect of giving them a realistic opportunity to get into the mainstream of Mobile's life, not only in the political life, but will give them an opportunity to have an input and impact on the economic, social, and cultural life of the city. It will afford an opportunity for a more meaningful dialogue between the whites and blacks to develop.

IV

There is a traditional constitutional tolerance of various forms of local government. See, e.g., *Abate v. Mundt*, 403 U.S. 182, 185, 91 S.Ct. 1904, 29 L.Ed.2d 399 (1971).

The court recognizes the "delicate issues of federal-state relations underlying this case." *Mayor of the City of Philadelphia, supra*, 415 U.S. at 615, 94 S.Ct. at 1331.

The futility of piecemeal efforts to correct racially discriminatory problems here has been demonstrated in *Davis v. Board of School Commissioners*, as well as the suits previously filed against the city. The city commission form of government is newer and less widely used than the mayor-councilman (or alderman) form. Mobile operated under a mayor-councilman (in Mobile history sometimes called commissioner, mayor-alderman, etc.) plan from the time Alabama entered the Union in 1819 until 1911. Most of the other municipalities in the county and state operate under such a plan. The change is not from the known to the unknown or from the old to the new. The court is unable to see how the impermissibly unconstitutional dilution can be effectively corrected by any other approach.

The defendants have argued the governing body needs a citywide perspective, and quoted 87 Harv.L.Rev. 1851, 1857 (1974). "The districtwide perspective and allegiance which result from representatives being elected at-large, and which enhance their ability to deal with districtwide problems, would seem more useful in a public body with responsibility only for the district than in a statewide legislature."

In a mayor-councilman plan, the mayor, the principal governing official, will be elected at-large and will have this citywide perspective, but the governing body will have the

benefit of members from single member districts.[20]

[20]*Dove, et al. v. Moore, et al.*, 539 F.2d 1152 (8th Cir. 1976), set out at n.3;

"The author has previously discussed at length the undesirable characteristics of at-large elections and the benefits of single-member districts. *Chapman v. Meier*, 372 F.Supp. 371, 388-94 (D.N.D.1974) (three-judge court) (Bright, J., dissenting), *majority reversed*, 420 U.S. 1, 95 S.Ct. 751, 42 L.Ed.2d 766 (1975). In the context of a discussion of proposed plans for the reapportionment of a state legislature, the dissent emphasized the following benefits of single-member districts:

(1) It gives a voter a chance to compare only two candidates, head to head in making a choice.
(2) It prevents one political party with a heavy plurality in one or two potential districts from dominating other potential districts that might narrowly go for the candidate of the opposite party.
(3) It prevents a city wide political organization from ostracizing or disciplining a legislator, who dare stray from the machine's line.
(4) It permits a citizen to identify a legislator as his senator and makes direct communication easier.
(5) It makes each senator responsible for his actions and makes it difficult for a senator to fade into the ranks of "the team" to avoid being identified with specific actions taken.
(6) It reduces campaign costs and "personalizes" a campaign.
(7) It creates greater interest in the possibility of a citizen seeking a legislative seat without the political machine blessing.
(8) It would diminish the animosity created in the legislature against multi-senate districts because of the tendency of senators elected by one political party from a city to vote as a bloc.
(9) It would tend to guarantee an individual point of view if all senators are not elected as a team.
(10) It would equalize the power of people in single senate districts with the people in the broken down multi-senate districts to *influence* the *election* of *only one* senator.
[372 F.Supp. at 391 (footnote omitted) (emphasis in original).]"

It is the court's conclusion that a mayor-councilman (alderman) form of government should be drafted. The court requested, and received from the plaintiffs and defendants, the recommendation of three persons from which the court would choose a three-person committee to draft and recommend to the court such a form of government.[21]

The next question is choice of council size and apportionment. The court could revert to the plan which was in effect when Mobile adopted the commission plan, or it could utilize Alabama Code Title 37, Sec. 426 (1940 Supp. 1973).

The pre-1911 plan consisted of a fifteen member council with seven elected at-large and eight from single-member districts. To have this many of the council elected from at-large will tend to perpetuate the multi-member districting which the court has found unconstitutional.

The present provisions of Sec. 426 allow Mobile to adopt one of several type plans. The overwhelming evidence in the case established that the type of plan provided is what is commonly known as "weak mayor-council" type plan and is undesirable. There are also problems with three of the four plans which provide for at-large elections, the evil the court has found to exist in the present form of the city government.

The court requested the plaintiffs and defendants to draft and present to the court proposed single-member districts for councilmen under a mayor-council plan. The plaintiffs presented to the court a nine single-member district plan. The defendants chose not to avail themselves of this

[21]The court has appointed this committee and has given them a target date of December 1, 1976, to make their recommendations.

opportunity. A nine member plan has previously been adopted in part in two of Alabama's largest cities, Birmingham and Montgomery.

The next city election is scheduled for August, 1977. The court finds it would not be in the public interest to shorten the terms of present commissioners.

It is therefore ORDERED, ADJUDGED, and DECREED that there shall be elected in the August, 1977 municipal election, a mayor elected at-large and nine council members elected from nine single-member districts.

The plaintiffs' claims for attorneys' fees and costs will be determined after a hearing on these issues.

The court recognizes that the ordering of the change of the city form of government has raised serious constitutional issues. Reasonable persons can reasonably differ. The only remaining duties to be performed in this court are the approval of the mayor-councilman plan with relation to their duties, its implementation, and the approval of a nine single-member district plan. It is the court's judgment that this decree this date is a final judgment and decree from which an appeal may be taken. However, in the event it is not a final decree, the court *ex mero motu* pursuant to 28 U.S.C. §1292(b) finds that the order herein entered involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of this litigation and grants the right to either party to take an immediate appeal.

It is the court's desire that if this order is appealed, such an appeal be taken promptly in order to provide the appellate courts with an opportunity to review, and, if possible, render a ruling prior to the campaign and election for the city government offices as scheduled for August, 1977.

Pending further orders, the court retains jurisdiction of this action to secure compliance with its decree issued contemporaneously herewith and for such other and further relief as may be equitable and just.

APPENDIX C

[caption omited in printing]

JUDGMENT

The court has heretofore entered its findings of fact and conclusions of law in favor of the plaintiffs and against the defendants, Gary A. Greenough, Robert B. Doyle, Jr., and Lambert C. Mims, individually and in their official capacities as Mobile City Commissioners.

The court has found that the electoral structure, the multi-member at-large election of Mobile City Commissioners, results in an constitutional dilution of the black plaintiffs' voting strength. It is fundamentally unfair and invidiously discriminatory. The court has found that it is not feasible to elect city commissioners who exercise certain specific duties, to wit, one, Public Works and Services, another, Public Safety, and a third, the Department of Finance, from districts representing one-third or portions of the total population. The court has found that a mayor-council plan with nine single-member council districts would correct the unconstitutional dilution of the black plaintiffs' vote. The court has ordered a committee of three, selected from recommendations of three persons submitted by the plaintiffs and three persons by the defendants, to draft a "strong" mayor-councilman form of government with the mayor to be chosen at-large and the councilmen to be chosen from nine single-member districts. The court has under consideration proposed nine single-member districts and will order such a plan adopted later.

It is therefore ORDERED, ADJUDGED, and DECREED that there shall be elected in the August, 1977 municipal election, a mayor elected at-large and nine

council members elected from nine single-member districts.

The plaintiffs' claims for attorneys' fees and costs will be determined after a hearing on these issues.

The court recognizes that the ordering of the change of the city form of government has raised serious constitutional issues. Reasonable persons can reasonably differ. The only remaining duties to be performed in this court are the approval of the mayor-councilman plan with relation to their duties, its implementation, and the approval of a nine single-member district plan. It is the court's judgment that this decree this date is a final judgment and decree from which an appeal may be taken. However, in the event it is not a final decree, the court *ex mero motu* pursuant to Title 28 U.S.C. §1292(b) finds that the order herein entered involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of this litigation and grants the right to either party to take an immediate appeal.

It is the court's desire that if this order is appealed, such an appeal be taken promptly in order to provide the appellate courts with an opportunity to review, and, if possible, render a ruling prior to the campaign and election for the city government offices as scheduled for August, 1977.

Pending further orders, the court retains jurisdiction of this action to secure compliance with its order issued contemporaneously with this decree and for such other and further relief as may be equitable and just.

Done, this the 22nd day of October, 1976.

/s/ Virgil Pittman

UNITED STATES DISTRICT JUDGE

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED AND ENTERED THIS THE
22nd DAY OF OCTOBER, 1976
MINUTE ENTRY NO. 42080
WILLIAM J. O'CONNOR, CLERK
BY _____
Deputy Clerk

APPENDIX B

[caption omitted in printing]

ORDER

On the 21st day of October, 1976, this court entered an order in this cause. The order decreed that a mayor-council plan of government would be adopted by this court with nine single-member council districts.

The court requested and received from the plaintiffs and defendants, three names recommended by each from whom the court selected a committee to formulate and recommend a mayor-council plan. The court selected two names recommended by the defendants, City of Mobile, et al.; Joseph N. Langan and Arthur R. Outlaw, two former city commissioners of the City of Mobile, and one recommended by the plaintiffs, James E. Buskey, a black State Legislator.

The court requested the plaintiffs and defendants to submit proposed councilmen districts made up of nine single-member districts. The plaintiffs complied. The defendants declined to file a plan.

The committee appointed by the court to draft a mayor-council plan submitted an initial plan. The court submitted the plan to all of the parties for their recommendations and invited all members of the Mobile County legislative delegation to make recommendations. The attorneys for the plaintiffs, and one member of the Mobile County delegation, accepted the invitation and made recommendations, many of which have been incorporated in the final plan. The defendants declined to make any recommendations. Most of the other members of the Mobile legislative delegation expressed a general view that it created a conflict between

their legislative duties and the judicial branch and did not desire to make recommendations.[1]

It is hereby ORDERED, ADJUDGED, and DECREED that the mayor-council plan attached to this order as Appendix A, is hereby ADOPTED and made a part of this order the same as if set out at length herein.

It is further ORDERED, ADJUDGED, and DECREED that the nine single-member council districts as submitted by the plaintiffs' Plan "H", together with the map attached to the plan as Exhibit "A", both of which are attached to this order as Appendix B, is hereby ADOPTED and made a part of this order the same as if set out at length herein.

Beginning at the regularly scheduled city elections in August 1977, and each four years thereafter, the City of Mobile shall elect nine members to a city council and a mayor. The mayor and the city council shall have such powers, duties and responsibilities as are established by the report of the committee appointed by this court on October 6, 1976, attached hereto as Appendix A, and as are established by the provisions of *Ala. Code*, Tit. 37, dealing with cities generally or cities having a mayor-alderman form of government. To the extent that the report or this order conflicts with the *Alabama Code*, the report or order shall prevail.

One member of the City Council shall be elected by and from each district. A candidate for the council and each member of the council shall reside in the district represented or sought to be represented.

Nothing in this order shall prevent the defendants or Legislature of Alabama from changing the powers, duties, responsibilities, or terms of office of the city council and

[1]Some declined because the City of Mobile was not in their district.

mayor, or changing the boundaries of wards or districts, or changing the number of wards; provided however that the court retains jurisdiction for six years from the date of this order to review such changes for comformity with the principles enunciated in the order of this court entered in this case on October 21, 1976.

The court is aware that numerous local acts having application to the City of Mobile are in effect. Because of the change from a commission form to a city council form, there may be conflicts between the plan herein adopted and those acts. The court specifically retains jurisdiction for a period of two years from the date the first city council members take office for all purposes for persons having standing.

The retained jurisdiction of this court under the two preceding paragraphs shall be dissolved upon motion of either party when and if the Legislature of Alabama adopts (a) a comprehensive act establishing a constitutional form of government for the City of Mobile, or (b) enables the City of Mobile to act under "home rule" powers to adopt such a comprehensive act.

The defendants City of Mobile, Gary A. Greenough, Lambert C. Mims, Robert B. Doyle, Jr., and their agents, servants, employees, and successors are hereby ENJOINED from failing to make the following changes with respect to the election of the elected officials of the City of Mobile:

1. Ward 33-99-1 is hereby split into east and west wards, divided by a line beginning at the south boundary of the ward on Stanton, running north to Costarides, west to Summerville, north to Andrews, and east to the ward boundary. The voters in these two areas may be constituted as separate wards or the eastern area may be reassigned as

part of MW-33-99-2.

2. Ward 35-103-1 is split into eastern and western divisions by a dividing line beginning at the west boundary of the ward, running east on Davis Avenue, south on Kennedy to the ward line. The two divisions shall be constituted as separate wards.

3. Ward 35-103-3 is split into northern and southern divisions by a line beginning in the northward boundary on Broad Street, running south to Elmira, east to Dearborn Street, south to New Jersey, east to Warren Street, north to Delaware, east to Interstate 10, south to Virginia Street, and east to Mobile Bay. These two divisions may be established as separate wards or the northern division may be redesignated as part of MW-35-103-2.

4. Ward 34-100-3 is split into southeastern and northwestern divisions by a line beginning on the east at Old Shell Road, west to East Drive, south to North Shenandoah, west to East Cumberland, south on East Cumberland and Ridgefield Road to the ward line. The residents of the southeastern area shall be reassigned to MW-34-100-2 or made a new ward.

5. Ward 35-104-2 is divided by a line beginning at the north ward boundary on Eslava Creek, running south along Eslava Creek and Dog River to old Military Road eastwardly to Dauphin Island Parkway, south to Rosedale Road, east to Brookley Field boundary and following said boundary eastwardly to Perimeter Road, thence east on Perimeter Road to Mobile Bay. The eastern portion of this ward may be designated a new ward or merged into MW-35-104-1. The western portion of this ward may be designated a new ward or merged into MW-35-104-3.

6. Nothing in this order shall prevent the defendants from changing any other ward boundaries, so long as the

boundaries described in this order for the new council districts are not disturbed.

7. The defendants shall undertake the merger or redesignation of wards immediately and shall inform each voter in an area designated or merged of the new ward designation in which he or she lives. The defendant shall work with the Board of Registrars to accomplish this task by May 1, 1977. If the defendants encounter problems with the Board of Registrars, they shall forthwith petition this court for an appropriate order, including making the Board of Registrars a party defendant.

8. The following districts for the election of members of the City Council of Mobile are hereby created and designated:

—District 1 shall consist of MW-33-98-1 and the western portion of MW-33-99-1.

—District 2 shall consist of the eastern part of MW-33-99-1, all of MW-33-99-2, MW-33-99-3, and MW-34-102-2, and the western part of MW-35-103-1.

—District 3 shall consist of MW-33-99-4, the eastern part of MW-35-103-1, MW-35-103-2, and the northern part of MW-35-103-3.

—District 4 shall consist of the southern part of MW-35-103-3, MW-34-102-3, MW-34-102-6, and MW-34-102-7.

—District 5 shall consist of MW-35-103-4, MW-35-104-1, and the eastern part of MW-35-104-2.

—District 6 shall consist of MW-35-104-3, MW-35-104-4, MW-35-104-5, and the western part of MW-35-104-2.

—District 7 shall consist of MW-34-100-1, MW-34-100-2, MW-34-101-4, MW-34-101-5, MW-34-101-6, and the southeastern part of MW-34-100-3.

—District 8 shall consist of MW-34-102-5, MW-34-102-1, MW-34-101-2, MW-34-101-3.

—District 9 shall consist of MW-34-101-1, MW-34-101-1, MW-34-100-4, and the northwestern part of MW-34-100-3.

9. The defendants shall forthwith take all steps necessary to prepare for the election of the city council and mayor.

The court reserves a decision upon the plaintiffs' claim for attorneys' fees and out-of-pocket expenses.

Done, this the 9th day of March, 1977.

/s/ Virgil Pittman

UNITED STATES DISTRICT JUDGE

U.S. DISTRICT COURT SOU. DIST. ALA.
FILED AND ENTERED THIS THE 9th DAY OF MARCH, 1977 MINUTE ENTRY NO. 43981
WILLIAM J. O'CONNOR, CLERK
BY DEPUTY CLERK

APPENDIX A [To Court Order]

A PLAN FOR THE MAYOR-COUNCIL FORM OF GOVERNMENT FOR THE CITY OF MOBILE

CHAPTER I

ARTICLE I

Section 1. First election. Upon this Chapter becoming applicable to the City of Mobile, the (MAYOR OF SAID CITY) shall call an election to be held on the third Tuesday in August 1977 for the election by the qualified electors of said city of nine councilmen and a mayor and the expense thereof shall be paid by said city.

Section 2. Election of first council and term of office. Council candidates shall qualify as provided in Section 10 hereof and shall meet the eligibility requirement set forth in Sections 11 and 12 hereof. Each voter in the election may cast one vote for a candidate from his district, and one vote for a candidate for mayor. Any district councilman candidate receiving a majority of the total votes cast by the electors of the district in which he is a candidate shall be elected as a district councilman in his district. If, in any district, no council candidate has received a majority, then another election shall be held upon the same day of the week three weeks thereafter to be called and held in the same mode and manner and under the same rules and regulations as the first election. In the second election there

shall be two candidates for each place upon the council to be filled in such second election; and these candidates shall be the two candidates in each such district who received the highest number of votes but who were not elected at the first election. The candidate for the council in each district receiving a majority of the votes cast in his district in the second election shall be elected, so that in the first and second elections a total of nine councilmen shall be elected. The councilmen so elected shall take office on the first Monday in October following the election. Each councilman shall hold office for four years, but shall serve until his successor shall have qualified. A councilman may succeed himself in office.

Section 3. Election of first mayor and term of office. Candidates for election as the first mayor hereunder shall qualify as provided in Section 28 hereof and shall meet the eligibility requirement in Section 29 of this Chapter. The candidate for mayor receiving the largest number of votes for the office at the first election shall be elected thereto, provided such candidate receives a majority of all votes cast for such office. If at the first election no candidate receives a majority of the votes cast for the office of mayor at such election, then another election shall be held upon the same day of the week three weeks thereafter to be called and held in the same mode and manner and under the same rules and regulations. In the second election there shall be two candidates for the office of mayor; and these candidates shall be the two who received the highest number of votes for said office at the first election, and the candidate receiving a majority vote in said second election shall be elected mayor.

Section 4. Conduct of election. The election shall be held and conducted in accordance with the provisions of Chapter 3 A of Title 37, Alabama Code of 1940, as amended, except as herein otherwise specifically provided.

Section 5. The Council. The Councilmen provided for in this article shall be known collectively as the Council of the City of Mobile and shall have the powers and duties hereinafter provided. The councilmen first elected shall qualify and take office in the manner hereinafter prescribed on the first Monday in October, following the date the election of all nine councilmen is completed, and thereupon such city shall at that time and thereby be and become organized under the Mayor-Council form of government provided under this chapter, and shall thereafter be governed by the provisions of this chapter.

ARTICLE II

LEGAL STATUS: FORM OF GOVERNMENT: POWERS

Section 6. Legal Status. When this Mayor-Council form of government becomes applicable to the City of Mobile it shall continue its existence as a body corporate under the name of "City of Mobile". The word "city" as hereinafter used shall mean and refer to City of Mobile. The City shall continue as a municipal corporation, within the corporate limits as now established and as may hereafter be fixed in the manner prescribed by law, subject to all duties and obligations then pertaining to or incumbent upon it as a municipal corporation and shall continue to enjoy all the rights, immunities, powers and franchises then enjoyed by

it, as well as those that may thereafter or hereinafter be granted to it.

Section 7. Form of government. The municipal government of said city proceeding under this chapter shall be known as the "Mayor-Council form of government". Pursuant to the provisions and limitations of this chapter and subject to the limitations imposed by the Constitution of Alabama and its laws, all powers of the city shall be vested in the council elected as herein provided and hereinafter referred to as "the Council", which shall enact ordinances, adopt budgets and determine policies. All powers of the city shall be exercised in the manner prescribed by this chapter, or if the manner be not prescribed by this chapter, then in such manner as may be prescribed by law or by ordinance.

Section 8. Powers of City. The City shall have all the powers granted to municipal corporations and to cities by the Constitution and laws of this State together with all the implied powers necessary to carry into execution all the powers granted.

ARTICLE III

THE COUNCIL

Section 9. Number, election, term. The council shall consist of nine members, who shall be known and elected as district councilmen. The nine district councilmen shall be elected from districts which shall be, as near as practicable, of equal population according to the last Federal Decennial

Census. The regular election shall be held on the third Tuesday in August preceding the expiration of the term of office of the members of the council, the expense thereof to be paid by said city, for the election by the qualified voters of such city of nine councilmen. Such election shall be held and conducted in accordance with the provisions of Chapter 3 A of Title 37, Alabama Code of 1940, as amended, except as otherwise provided by this plan, and Section 2 hereof shall apply to all subsequent elections.

Section 10. Statement of candidacy. Any person desiring to become a candidate in any election for the office of district councilman may become such candidate by filing in the office of the City Clerk, a statement in writing of such candidacy and an affidavit taken and certified by a notary public that such person is duly qualified to hold the office for which he desires to be a candidate. Such statement shall be filed not less than 42 days and not more than 82 days immediately preceding the day set for such election and shall be in substantially the following form: "State of Alabama, Mobile County. I, the undersigned, being first duly sworn, depose and say that I am a citizen of the City of Mobile, in said State and County, and reside at _____ in said City of Mobile, that I desire to become a candidate for the office of district councilman for the _____ district, in said city at the election for said office to be held on the ____ day of August next and that I am duly qualified to hold said office if elected thereto and I hereby request that my name be printed upon the official ballot at said election. Signed _____; Subscribed and sworn to before me by said _____ on this ____ day of _____, 19____, and filed in this office for record on said day, _____, City Clerk". Said statement shall be accompanied by a qualifying fee in the amount of $50.00

which fee shall be paid into the general fund of the City. A person may also become a candidate for the office of district councilman by filing a verified pauper's oath with the City Clerk, or by filing a verified petition containing an endorsement of candidacy by the signatures and addresses of 500 persons, each of whom is a registered voter residing in the city and within the district for which the individual intends to be a candidate for election to office, provided that no such signature may be obtained more than twelve (12) months immediately preceding the deadline for filing statements of candidacy. No primary election shall be held for the nomination of candidates for the office of councilman and candidates shall be nominated only as hereinabove provided.

Section 11. Qualification. Every person who shall be elected or appointed to the office of member of council, shall, on or before the first Monday of October following his election or before the Tuesday following the date of his appointment qualify by making oath that he is eligible for said office and will execute the duties of same according to the best of his knowledge and ability. Said oath may be administered by any person authorized to administer an oath under the laws of the State of Alabama and filed in the office of the City Clerk.

Section 12. Eligibility. Councilmen shall be qualified electors of the City, shall be residents of the district which they represent, and shall reside in the district during their term of office.

Section 13. Compensation. Each councilman shall receive as compensation for his services as such the sum of

Fifty ($50.00) Dollars for each meeting of the council attended, provided that the total of such compensation shall not exceed the sum of Thirty-six Hundred ($3,600.00) Dollars per annum. Such salary shall be payable in monthly installments at the end of each month. The council may fix a separate and additional stipend for the President of the Council, not to exceed One Hundred ($100.00) Dollars per month.

Section 14. Presiding Officer. The council shall elect an officer of the city who shall have the title of President of the Council and shall preside at meetings of the council. The council shall also elect a President pro tem, who shall act as President of the Council during the absence or disability of the President. The terms of office of the President and the President pro tem shall be for a term of two years and they may succeed themselves. If a vacancy shall occur in the office of the President of the Council, the council shall elect a successor for the completion of the unexpired term. Both the President of the Council and the President pro tem shall be elected from among the councilmen.

Section 15. Powers. All powers of the city, including all powers vested in it by this chapter, by the laws general and local, of the State, and by Title 62 of the *Code of Alabama* of 1940, as amended, and the determination of all matters of policy, shall be vested in the council. Without limitation of the foregoing, the council shall have power to:

(a) Confirm or deny confirmation to the Mayor's appointments of the members of all boards, commissions or other bodies authorized hereunder or by law. This provision does not apply to officers and employees in the administrative service of the city.

(b) Succeed to all the powers, rights and privileges

conferred upon the former governing body of the city by statutes in effect at the time this chapter becomes applicable and not in conflict herewith.

Section 16. Council not to interfere in appointments or removals. Neither the council nor any of its members shall direct or request the appointment of any person to, or his removal from, office or position by the mayor or by any of his subordinates, or in any manner take part in the appointment or removal of officers and employees in the administrative service of the city except as otherwise provided herein. Except for the purpose of inquiry, the council and its members shall deal with the administrative service solely through the mayor, but councilmen may report complaints and make inquiries and requests. The council nor any member thereof shall give orders to any subordinates of the mayor, either publicly or privately, but may report complaints and make requests. Such requests will not have any legal or binding force and effect.

Section 17. Vacancies in council. Vacancies in the council shall be filled by the council at the next regular or any subsequent meeting of the council, and if the term of office in which the vacancy occurs has less than one year before the expiration of the same, the person elected by the council shall hold office until the next regular city council election. If the term of office in which a vacancy occurs has more than one year to run before the expiration of the same then a special election shall be held to fill said unexpired term. If any general or special election is to be held in the city not more than 120 nor less than 60 days following the occurrence of a vacancy then the election to fill such vacancy on the council shall be held in conjunction with

such general or special election, otherwise a special election shall be called by the Mayor on a date set by him, and shall be held in accordance with the provisions of this chapter and the general laws of the State of Alabama, applicable to such city.

Section 18. Creation of new departments or offices; change of duties. The council by ordinance may create, change and abolish offices, departments, or agencies, other than the offices, departments and agencies established by this chapter. The council by ordinance may assign additional functions or duties to offices, departments or agencies established by this chapter, but may not discontinue or assign to any other office, department or agency any function or duty assigned by this chapter to a particular office, department or agency.

Section 19. City Clerk. The City Clerk of the city serving under the merit system at the time this chapter becomes applicable to the city shall continue to hold office as the City Clerk under the Mayor-Council form of government of such city, and his successor shall be selected and hold office subject to the provisions of such civil service or merit system. The council, with the concurrence of the mayor shall be the appointing authority in filling any vacancy in the office of city clerk. The City Clerk shall give notice of special or called meetings of the council, shall keep the journal of its proceedings, shall authenticate by his signature and record in full in a book kept for such purpose all ordinances and resolutions and shall perform such other duties as shall be required by this chapter or by ordinance, and such duties as are imposed by general law of Alabama upon city clerks and as to which other provisions are not made in this chapter.

Section 20. Induction of council into office; meetings of council. The first meeting of each newly elected council for induction into office, shall be held at ten o'clock in the morning on the first Monday in October next following its election, after which the council shall meet regularly at such times as may be prescribed by its rules, but not less frequently than once a week. All meetings of the council shall be open to the public.

Section 21. Council to be judge of qualifications of its members. The council shall be the judge of the election and qualifications of its members and for such purpose shall have power to subpoena witnesses and require the production of records, but the decision of the council in any such case shall be subject to review by the courts.

Section 22. Rules of procedure; journal. The council shall determine its own rules and order of business. It shall keep a journal of its proceedings and the journal shall be open to public inspection.

Section 23. Meetings, passage of ordinances, etc. The council shall hold regular public meetings on Tuesday of each and every week at a regular hour to be fixed by the order of said council from time to time and publicly announced; it may hold such adjourned, called, special or other meetings as the business of the city may require. The president of the council, when present, shall preside at all meetings of said council. Five members of the council shall constitute a quorum for the transaction of any and every power conferred upon said council, and the affirmative vote of at least four members of the council, provided such four constitute a majority of those voting, shall be sufficient for

the passage of any resolution, by-law or ordinance, or the transaction of any business of any sort by the said council or the exercise of any of the powers conferred upon it by the terms of this chapter or by law, or which may hereafter be conferred upon it. No resolution, by-law or ordinance granting any franchise, appropriating any money for any purpose, providing for any public improvements, any regulation concerning the public health, or of any other general or permanent nature, except the proclamation of quarantine, shall be enacted except at a regular public meeting of said council or an adjournment thereof. Every ordinance introduced at any and every such meeting shall be in writing and read before any vote thereon shall be taken, and the yeas and nays thereon shall be recorded; provided that if the vote of all councilmen present be unanimous, it may be so stated in the journal without recording the yeas and nays. A record of the proceedings of every meeting of the council shall be kept, and every resolution or ordinance passed by the council must be recorded and the record of the proceedings of the meeting shall, when approved by the council, be signed by the president of the council and the city clerk. Such records shall be kept available for inspection by all citizens of such city at all reasonable times. No ordinance of permanent operation shall be passed at the meeting at which it was introduced except by unanimous consent of all members of the council present, and such unanimous consent shall be shown by the yea and nay votes entered upon the minutes of said meeting; provided, however, that if all members of the council present vote for the passage of the ordinance and their names are so entered of record as voting in favor thereof, it shall be construed as giving unanimous consent to the action upon such ordinance at the meeting at which it is

introduced. All ordinances or resolutions, after having been passed by the council, shall by the clerk be transmitted within forty-eight (48) hours after their passage to the mayor for his consideration, who, if he shall approve thereof, shall sign and return the same to the clerk, who shall publish them, if publication thereof is required, and such ordinances and resolutions shall thereupon become effective and have the force of law. Delivery to the office of the mayor shall constitute delivery to the mayor. An ordinance or resolution may be recalled from the mayor at any time before it has become a law, or has been acted on by him, by a resolution adopted by a majority of the members elected to the council, in regular or special session. If the mayor shall disapprove of any ordinance or resolution transmitted to him as aforesaid, he shall, within ten (10) days of the time of its passage by the council, return the same to the clerk with his objections in writing, and the clerk shall make report thereof to the next regular meeting of the city council; and if two-thirds of the members elected to the said council shall at said meeting adhere to said ordinance or resolution, not withstanding said objections, said vote being taken by yeas and nays and spread upon the minutes, then, and not otherwise, said ordinance or resolution shall after publication thereof, if publication is required, have the force of law. If publication of said ordinance or resolution is not required, it shall take effect upon its passage over such veto. The failure of the mayor to return to the city clerk an ordinance or resolution with his veto within ten (10) days after its passage by the council shall operate and have the same effect as an approval of the same, and the city clerk, if publication is required, shall publish the same as is herein provided for the publication of laws and ordinances of said city. And if no publication is

required, the ordinance or resolution shall become effective upon the expiration of said ten (10) days. These provisions are subject to the publication of ordinances as set out in the Alabama Code of 1940 (Recomp. 1958), Section 462, as amended Title 37. Anything in this section to the contrary notwithstanding, the mayor shall not have the power of veto over any action of the council relating to an investigation as provided for in Section 87.

Section 24. Granting of franchises. No resolution or ordinance, granting to any person, firm or corporation any franchise, lease or right to use the streets, public highways, thoroughfares, or public way of said city, either in, under, upon, along, through, or over same shall take effect and be enforced until thirty days after the final enactment of same by the council and publication of said resolution or ordinance in full once a week for three consecutive weeks in some daily newspaper published in said city or if no such newspaper exists, then by posting in three public notices, which publication shall be made at the expense of the persons, firm or corporation applying for said grant. Pending the passage of any such resolution or ordinance or during the time intervening between its final passage, and the expiration of the thirty days during which publication shall be made as above provided, the legally qualified voters of said city may, by written petition or petitions addressed to said council, object to such grant, and if during such period such written petition or petitions signed by at least ten percent (10%) of the legally qualified voters of the city shall be filed with said council, said council shall forthwith order an election, which shall be conducted by the election commission of the city or other body or official charged with the duty of conducting elections therein, at which

election the legally qualified voters of said city shall vote for or against the proposed grant as set forth in the said resolution or ordinance. In the call for said election, the said resolution or ordinance making such grant shall be published at length and in full at the expense of the city in a newspaper published in said city by one publication. If a majority of the votes cast at such election shall be against the passage of said resolution or ordinance, then and in those events, said resolution or ordinance shall not become effective nor shall it confer any rights, powers or privileges of any kind, otherwise, said resolution or ordinance and said grant shall thereupon become effective as fully and to the same extent as if said election has not been called or held. If, as the result of said election, said resolution or ordinance shall not become effective, then it shall be the duty of said council, after the results of said election shall be determined, to pass a resolution or ordinance to that effect. No grant of any franchise or lease or right of user, or any other right, in, under, upon, along, through, or over the streets, public highways, thoroughfares or public ways of any such city, shall be made or given nor shall any such rights of any kind whatever be conferred upon any person, firm or corporation, except by resolution or ordinance duly passed by the council at some regular or adjourned regular meeting and published as above provided for in this Section; nor shall any extension or enlargement of any such rights or powers previously granted be made or given except in the manner and subject to all the conditions herein provided for as to the original grant of same. It is expressly provided, however, that the provisions of this Section shall not apply to the grant of side track or switching privileges to any railroad for the purpose of reaching and affording railway connections, and switch privileges to the owners or users of

any industrial plan, store or warehouse; provided further, that said track or switch shall not extend for a greater distance than one thousand, three hundred twenty feet.

Section 25. Codification authorized. The council may provide at any time it may deem proper, for the revision and codification of its ordinances, by-laws, and permanent resolutions, or for the adoption of a code or codes by ordinance. Such code or codes and the revisions or amendments thereof may relate to the whole system of city by-laws, ordinances and permanent resolutions, or may relate to that portion of such ordinances, by-laws and permanent resolutions which relate to, affect or purport to govern any particular subject or subjects or subdivisions of municipal legislation. The council shall have full power and authority to prescribe the manner in which said code or codes, revisions, or amendments thereto, shall be made public, whether by proclamation of any officer or officers of said city by posting or by publication, one or all, but it shall not be necessary unless so prescribed by the council for such code or codes, revisions or amendments thereto, to be published in a newspaper or newspapers. Nor shall it be necessary that such code or codes, revisions or amendments thereto, be spread at length upon the minutes, but they will be noted in the minutes. The council may prescribe that such code or codes, revisions or amendments thereto may be certified by and filed with the city clerk, or other corresponding officer, in lieu of spreading at length the same on the minutes; and the council may prescribe the manner in which copies of such code or codes, revisions, or amendments thereto, may be officially certified for use by the inhabitants or by the courts. The council may adopt and provide for the maintenance in a designated office of the city of a comprehensive zone map of the city open for

inspection by the public at all reasonable times, and may make such zone map a part of any ordinance by reference thereto in such ordinance and without publication of such zone map in any newspaper. Such zone map need not be in one piece but may for convenience be in sections. A zone map of territory newly added to the city shall be treated as a comprehensive zone map of the city for purposes of application of the provisions of the next preceding sentence. These provisions are subject to the publication of ordinances, etc., as set out in the Alabama Code of 1940 (Recomp. 1958), Section 462, as amended, Title 37.

Section 26. Examination of books and publication of accounts. The council shall each month print in pamphlet form a detailed statement of all receipts and expenses of the city, and a summary of its proceedings during the preceding month, and furnish printed copies thereof to the daily newspapers of the city, other members of the news media of the city, and to persons who apply therefor. At the end of each year, the council shall cause a full and complete examination of all the books and accounts of the city to be made by a certified public accountant, or by the state department of examiner of public accounts, and shall cause the result of such examination to be published in the manner above provided for publication of statements of monthly expenditures. Such examination shall not be made more than two years in succession by the same accountant.

ARTICLE IV

MAYOR

Section 27. The mayor, election, term, qualification. The first mayor shall be elected at the same election at which the councilmen are elected under the provisions of Sections 1 and 3 of this chapter. The first mayor shall qualify and take office in the manner hereinafter prescribed. The mayor shall take office on the first Monday in October in the same year of election, and shall serve for four years. The regular election for mayor shall be held on the third Tuesday in August of the year during which the term of the first mayor elected hereunder terminates and every four years thereafter. The mayor elected at such regular election, shall, on or before the first Monday of October following his election qualify by making oath that he is eligible for said office and will execute the duties of same according to the best of his knowledge and ability. Said oath may be administered by any person authorized to administer an oath under the laws of Alabama. At any election for mayor the candidate receiving the highest number of votes for the office shall be elected thereto, provided such candidate received a majority of all votes cast for such office. If at the first election a majority is not received by any candidate for the office of mayor, then a second election shall be held on the third Tuesday thereafter in the same mode and manner and under the same rules and regulations provided in Sections 1 and 3 hereof with respect to election of the first mayor.

Section 28. Statement of candidacy. Any person desiring to become a candidate at any election for the office of

mayor may become such candidate by filing in the office of the City Clerk a statement in writing of such candidacy, accompanied by an affidavit taken and certified by a notary public that such person is duly qualified to hold the office for which he desires to be a candidate. Such statement shall be filed not less than 42 days and not more than 82 days immediately preceding the day set for such election and shall be in substantially the following form: "State of Alabama, Mobile County, I, the undersigned, being first duly sworn, depose and say that I am a citizen of the City of Mobile, in said State and County, reside at _____ in said City of Mobile, that I desire to become a candidate for the office of mayor in said city at the election of said office to be held on the ____ day of August next and that I am duly qualified to hold said office if elected thereto and I hereby request that my name be printed upon the official ballot at said election. Signed _____ Subscribed and sworn to before me by said _____ on this ____ day of _____, 19____, and filed in this office for record on said day, _____. City Clerk." Said statement shall be accompanied by a qualifying fee in the amount of $300.00, which qualifying fee shall be paid into the general fund of the city, or in lieu thereof a person may also become a candidate for the office of mayor by filing a verified pauper's oath with the City Clerk, or by filing a verified petition containing an endorsement of candidacy by the signatures and addresses of 2,000 persons, each of whom is a registered voter residing in the city, provided that no such signature may be obtained more than twelve (12) months immediately preceding the deadline for filing statement of candidacy.

Section 29. Eligibility. The mayor shall be a qualified elector, and a resident of the city, and shall reside within the city during his term of office.

Section 30. Compensation. The mayor shall receive an annual salary in the sum of Thirty Thousand ($30,000.00) Dollars, payable in monthly installments at the end of each month, said installments to be paid at the same rate for any portion of the month during which the mayor shall hold office at the rate thus provided.

Section 31. Vacancy in office of mayor. Whenever any vacancy in the office of mayor shall occur by reason of death, resignation, removal or any other cause, the president of the council shall assume the duties of the office of mayor effective on the date such vacancy occurs and shall serve as acting mayor until a new mayor is elected and qualified as hereinafter provided. The acting mayor shall receive no compensation, expenses or allowances as a councilman while acting as mayor, but he will receive the same rate of pay and allowances provided for the mayor whose vacated office he fills, and the compensation received for days of service as acting mayor shall not be counted in determining the maximum annual per diem compensation permitted council members. While the president of the council is serving as acting mayor he may attend council meetings but not vote on any matters before the council. The council shall within five (5) days of the occurrence of the vacancy in the office of the mayor call a special election to fill such vacancy, such election to be held on a Tuesday not less than forty-five (45) days and not more than sixty (60) days from the occurrence of such vacancy; provided; however, if a regular or special election is scheduled or required to be held within one hundred twenty (120) days after the occurrence of such vacancy but more than fifty (50) days after such occurrence, then the vacancy in the office of mayor will be filled at such regular

or special election. Notice of such election shall be given at the expense of the city by one publication not less than forty-five (45) days in advance of the same in one or more newspapers published in such city. The method, procedure and requirements of qualifying, voting upon and determining the successful candidate shall be the same as is provided herein relative to the election of the mayor at regular elections, except that statements of candidacy must be filed not less than thirty (30) days immediately preceding the date set for such election. The successor to the mayor chosen at any such election shall qualify for office as soon as practical thereafter, and shall be clothed with and assume the duties, responsibilities and powers of such office immediately upon such qualification, and shall hold office for the unexpired term of his predecessor and until his successor is elected and qualified.

Section 32. The mayor; powers and duties. The mayor shall be the head of the administrative branch of the city government. He may attend council meetings but not vote in its proceedings and he shall have the power and duties herein conferred. He shall be responsible for the proper administration of all affairs of the city, and subject to the provisions of any civil service or merit system law applicable to such city and except as otherwise provided herein, he shall have power and shall be required to:

(1) Enforce all laws and ordinances.

(2) Appoint and, when necessary for the good of the service, remove all officers and employees of the city except as otherwise provided by this chapter, except as he may authorize the head of a department or office to appoint and remove subordinates in such department or office, all subject to any Merit System provision in effect at such time.

(3) Appoint all members of boards, commissions or other bodies authorized herein or by law, subject to the confirmation by the council. When any appointment is sent to the council for confirmation and the council fails to either confirm or deny confirmation of the appointment for a period of thirty days the appointment shall be deemed confirmed without action by the council. This provision for appointment of members of boards, commissions or other bodies authorized herein or by law shall supersede any different provisions for appointment of such members contained in any statute or ordinance in effect at the time this chapter becomes effective, and shall include power to remove any member of the board, commission or body to the same extent as might be done by the preceding governing body of the city, and to appoint another in his stead. And wherever any statute provides that the chief executive officer of the city is designated to act in any capacity ex-officio, the mayor shall act.

(4) Exercise administrative supervision and control over all departments created by this chapter or by law or hereafter created by the council, except those otherwise given independent status under this chapter.

(5) Keep the council fully advised as to the financial conditions and needs of the city; prepare and submit the budget annually to the council and be responsible for its administration after its adoption; prepare and submit, as of the end of the fiscal year, a complete report on the financial and administrative activities of the city for such year.

(6) Recommend to the council such actions as he may deem desirable.

(7) Prepare and submit to the council such reports as may be required of him.

(8) Perform such other duties as may be prescribed by this chapter.

(9) Fix the salaries or compensation of all officers and employees of the city who are appointable by him, subject, however, to the provisions of any civil service or merit law applicable to the city.

Section 33. Administrative departments. There shall be a department of finance and such other departments as may be established by ordinance upon the recommendation of the mayor.

Section 34. Directors of departments. At the head of each department there shall be a director, who shall be an officer of the city and shall have supervision and control of the department subject to the mayor. Two or more departments may be headed by the same individual, the mayor may head one or more departments, and directors of departments may also serve as chiefs of divisions.

Section 35. Departmental divisions. The work of each department may be distributed among such divisions thereof as may be established by ordinance upon the recommendation of the mayor. Pending the passage of an ordinance or ordinances distributing the work of departments under the supervision and control of the mayor among specific divisions thereof, the mayor may establish temporary divisions.

Section 36. Chief Administrative Assistant to the Mayor. The mayor is hereby authorized to employ for and on behalf of the city an employee to be known as Chief Administrative Assistant to the Mayor, to serve at the pleasure of the mayor, to define the duties of said employee, and to fix compensation at a salary not in excess of the highest non-

elected employee of the municipality. The Chief Administrative Assistant to the mayor shall perform such administrative and supervisory duties related to the office of the mayor as the mayor may delegate; shall keep informed of all developments within the various departments of the city government and may analyze and recommend procedures and administrative changes for such departments; shall assist the mayor in coordinating the preparation of the executive budget; shall review personnel action requests prior to submission to the mayor; shall make feasibility studies of major proposals eminating from the city council and various other duties as assigned by the mayor. The Chief Administrative Assistant to the Mayor as employed hereunder must reside within the city during the term of employment. Said Chief Administrative Assistant to the Mayor shall not be subject to the provisions of any merit system. This section shall not limit the authority of said mayor to appoint other employees of said city under civil service or otherwise authorized by any law.

Section 37. Executive Secretary. The mayor is hereby authorized to employ for and on behalf of the city an employee to be known as Executive Secretary to serve at the pleasure of the mayor, to define the duties of said employee, and to fix compensation at a salary not in excess of the highest paid non-elected employee of the municipality. The duties of the Executive Secretary shall be the coordinating and planning of the mayor's public appearances, appointments, and press relations, as well as to assist the mayor in making feasibility studies of major policy proposals eminating from the city council, monitoring the activities of the city council and various other duties as the mayor may delegate. The Executive Secretary employed hereunder must reside within the city during the term of

employment. Said Executive Secretary shall not be subject to the provisions of the merit system. This section shall not limit the authority of said mayor to appoint other employees of said city under civil service or otherwise where authorized by any other law.

ARTICLE V

BUDGET

Section 38. Fiscal year. The fiscal year of the city government shall begin on the first day of October and shall end on the last day of September of each calendar year. Such fiscal year shall also constitute the budget and accounting year. As used in this chapter, the term "budget year" shall mean the fiscal year for which any particular budget is adopted and in which it is administered.

Section 39. Submission of budgets. On a day to be fixed by the council but in no case later than the 20th day of August in each year, the mayor shall submit to the council:

(a) A separate current revenue and expense budget for the general operation of the city government, to be known as the "general fund budget";

(b) A budget for each public utility owned and operated by such city;

(c) A capital budget; and

(d) A budget message.

When submitting the budgets to the council, the mayor shall submit his recommendation of new sources of revenue or manner of increasing existing sources of revenue, sufficient to balance the budgets, if such additional revenue is necessary to accomplish that purpose.

Section 40. Preparation of budgets. It shall be the duty of the head of each department, and each other office or agency supported in whole or in part by the city, to file with the Director of Finance, at such time as the mayor may prescribe, estimates of revenue and expenditure for that department, office or agency for the ensuing fiscal year. Such estimates shall be submitted on the forms furnished by the Director of Finance and it shall be the duty of the head of each department, office or agency, to supply all the information which the Director of Finance may require to be submitted thereon. The Director of Finance shall assemble and compile these estimates and supply such additional information relating to the financial transactions of the city as may be required by the mayor in the preparation of the budgets. The mayor shall hold such hearings as he may deem advisable and with the assistance of the Director of Finance shall review the estimates and other data pertinent to the preparation of the budgets and make such revisions in such estimates as he may deem proper, subject to the laws of the State of Alabama and any municipal ordinance relating to obligatory expenditures for any purpose.

Section 41. Scope of General Fund Budget. The general fund budget shall include only the net amounts estimated to be received from or to be appropriated to each public utility. The general fund budget shall be prepared in accordance with accepted principles of municipal accounting and budgetary procedures and techniques, and shall show:

(a) such portion of the general fund cash surplus as it is estimated will exist, at the end of the current fiscal year, and is proposed to be used for meeting expenditures in the general fund budget for the ensuing year;

(b) an estimate of the receipts from current ad valorem

taxes on real estate and tangible personal property during the ensuing fiscal year, assuming that the percentage of the levy collected be no greater than the average percentage of the levy collected in the last three completed tax years.

(c) an estimate of receipts from all other sources of revenue, provided that the estimated receipts from each such source shall not exceed the percentage of estimated revenue in the current fiscal year from the same source, over the amount of the revenue received from the same source in the last completed fiscal year, unless a law or ordinance under which revenue from any source is derived, has been amended or a new source of revenue has been provided by law or ordinance, in the course of the current year, in which case the estimated receipts from that source may be fixed by the mayor. If additional revenue is to be derived from the State, the amount fixed by the mayor shall not exceed the amount which the proper State official shall certify in writing to be the reasonable expectation of receipts from such source;

(d) a statement to be furnished by the Director of Finance of the debt service requirements for the ensuing year;

(e) an estimate of the general fund cash deficit, if any, at the end of the current fiscal year and of any other obligations required by law to be budgeted for the ensuing fiscal year;

(f) an estimate of expenditures and appropriations for all other purposes to be met from the general fund in the ensuing fiscal year. All the estimates shall be in detail showing receipts by sources and expenditures by operating units, character and object, so arranged as to show receipts and expenditures as estimated for the current fiscal year and actual receipts and expenditures for the last fiscal year,

in comparison with estimated receipts and recommended expenditures for the ensuing fiscal year.

Section 42. A balanced budget. In no event shall the expenditures recommended by the mayor in the general fund budget exceed ninety-eight (98%) percent of the receipts estimated, taking into account the estimated cash surplus or deficit at the end of the current fiscal year, as provided in the preceding section, unless the mayor shall recommend an increase in or levy of new or increased taxes or licenses within the power of the city to levy and collect in the ensuing fiscal year, the receipts from which, estimated on the basis of the average experience with the same or similar taxes during the three full tax years last past, will make up the difference. If estimated receipts exceed estimated expenditures, the mayor may recommend revisions in the tax and license ordinances of the city in order to bring the general fund budget into balance. The same balanced budget restrictions shall apply in the adoption of any public utility budget.

Section 43. The budget message. The budget message shall contain the recommendations of the mayor concerning the fiscal policy of the city, a description of the important features of the budget plan, an explanation of all salient changes in each budget submitted, as to estimated receipts and recommended expenditures as compared with the current fiscal year and the last preceding fiscal year, and a summary of the proposed budgets showing comparisons similar to those required by Section 41 above.

Section 44. Availability of budgets for Inspection and Publication of the Budget Message. The mayor shall cause the budget message to be printed, mimeographed or

otherwise reproduced for general distribution at the time of its submission to the council and sufficient copies of the proposed general fund, public utility and capital budgets to be made, to supply copies to each member of the council and each daily newspaper of general circulation published in the city and all other members of the news media in the city, and two copies to be deposited in the office of the city clerk where they shall be open to public inspection during regular business hours.

Section 45. Publication of Notice of Public Hearing. At the meeting of the council at which the budget and budget message are submitted, the council shall determine the place and time of the public hearing on the budget, and shall cause to be published a notice of the place and time, not less than seven days after the date of publication, at which the council will hold a public hearing. Publication shall be made at least once in a daily newspaper published and of general circulation in the city. At the time and place so advertised, or at any time and place to which such public hearing shall from time to time be adjourned, the council shall hold a public hearing on the budget as submitted, at which any citizen of the city shall be given an opportunity to be heard, for or against the estimates of any item thereof.

Section 46. Action by the council on the general fund budget. After the conclusion of the public hearing the council may insert new items of expenditures or may increase, decrease or strike out items of expenditure in the general fund budget, except that no item of expenditure for debt service, or any other item required to be included by this chapter or other provision of law, shall be reduced or stricken out. The council shall not alter the estimates of

receipts contained in the said budget except to correct omissions or mathematical errors and it shall not cause the total of expenditures as recommended by the mayor to be increased without a public hearing on such increase, which shall be held not less than three days after notice thereof by publication in a newspaper of general circulation published in the city. The council shall in no event adopt a general fund budget in which the total of expenditures exceeds nine-eight percent of the receipts and available surplus, estimated as provided in Section 41 of this chapter unless at the same time it adopts measures for providing additional revenue in the ensuing fiscal year, estimated as provided in Sections 39 and 42 of this chapter, sufficient to make up the difference.

Section 47. Adoption of General Fund Budget. Not later than the 20th day of September of the current fiscal year, the council by a majority vote shall adopt the general fund budget, and such ordinance providing for additional revenue as may be necessary to put the budget in balance, including a 2% reserve. If for any reason the council fails to adopt the general fund budget on or before such day, the general fund budget of the current fiscal year shall be the general fund budget for the ensuing year, until such time as a newly revised budget shall be adopted by the council, and, until such time, shall have full force and effect to the same extent as if the same had been adopted by the council, notwithstanding anything to the contrary in this chapter.

Section 48. Expenditure Line Item, Veto by Mayor. If the mayor shall disapprove of any expenditure line item contained in the budget transmitted to him by the council, he shall, within ten (10) days of the time of its passage by

the council, return the same to the clerk with his objections in writing, and the clerk shall make report thereof to the next regular meeting of the city council, and if two-thirds of the members elected to the said council shall at said meeting adhere to said expenditure line item by yeas and nays and spread upon the minutes, then and not otherwise, said expenditure line item shall become effective.

Section 49. Effective Date of Budget; Certification; Copies Made Available. Upon final adoption, the budget shall be in effect for the budget year. A copy of the budget, as finally adopted, shall be certified by the mayor and city clerk and filed in the office of the Director of Finance. The budget so certified shall be printed, mimeographed or otherwise reproduced and sufficient copies thereof shall be made available for the use of all offices, departments and agencies and for the use of the citizens of the city who request a copy.

Section 50. Utility Budgets. Separate budget estimates for any public utilities owned and operated by the city shall be submitted to the Director of Finance at the same time as the budget estimates of other departments, and in the form prescribed by the Director of Finance. The mayor shall present to the council the budget for the utility operation, itemizing the receipts and expenditures in manner and form as is generally provided for in Section 41 of this chapter as being applicable to the general fund budget.

Section 51. Work Plan and Allotments. After the current expense budgets have been adopted and before the beginning of the fiscal year the head of each department, office, and agency,shall submit to the mayor in such form as he shall prescribe a work program which shall show the requested allotments of the appropriations for such

department, office or agency for the entire fiscal year by monthly or quarterly periods as the mayor may direct. Before the beginning of the fiscal year the mayor shall approve, with such amendments as he shall determine, the allotments for each such department, office, or agency, and shall file the same with the Director of Finance who shall not authorize any expenditure to be made from any appropriation except on the basis of approved allotments, provided that such allotments shall be in conformity with the salaries established by ordinance, the provisions of any merit or civil service system applicable to such city, the laws of the State of Alabama and any municipal ordinances of such city, relating to obligatory expenditures for any purpose. The aggregate of such allotments shall not exceed the total appropriation available to each such department, office, or agency for the fiscal year. An approved allotment may be revised during the fiscal year in the same manner as the original allotment was made. If at any time during the fiscal year the mayor shall ascertain that the revenue cash receipts of the general fund or any public utility for the year plus any cash surplus available from the preceding year, will be less than the total appropriations to be met from such receipts and said surplus, he shall reconsider the work and allotments of the departments, offices and agencies, and, subject to the laws of the State of Alabama and any municipal ordinances of the city relating to obligatory expenditures for any purpose, revise the allotments so as to forestall the incurring of a deficit; provided, however, that there shall be no reduction in salaries except by order of the council, or as authorized by law.

Section 52. Transfers of Appropriations. The mayor may at any time authorize, at the request of any department,

office, or agency, the transfer of any unencumbered balance or portion thereof in any general fund appropriation from one classification of expenditure to another within the same department, office or agency. At the request of the mayoir, the council may by resolution transfer any unencumbered balance or portion therefof in any general fund appropriation from one department, office or agency to another.

Section 53. Additional Appropriations. Appropriations in addition to those contained in the original general fund budget ordinance, may be made by the council by not less than five affirmative votes, but only on the recommendation of the mayor and only if the Director of Finance certifies in writing that there is available in the general fund a sum unencumbered and unappropriated sufficient to meet such appropriation.

Section 54. Emergency Appropriations. At any time in any budget year, the council may, pursuant to this Section, make emergency appropriations to meet a pressing need for public expenditures, for other than a regular or recurring requirement, to protect the public health, safety or welfare. Such appropriation may be made by the council, by not less than five affirmative votes, but only on the recommendation of the mayor. The total amount of all emergency appropriations made in any budget year shall not exceed five per centum of the total general fund operating appropriations made in the budget for that year.

Section 55. Appropriations to Lapse. Any portion of an appropriation remaining unexpended and unencumbered at the close of the fiscal year, shall lapse.

Section 56. Capital Budget. At the same time that he

submits the general fund budget, the mayor shall submit to the council a capital improvement program covering all recommended capital improvement projects, for the ensuing fiscal year and for the four fiscal years thereafter, with his recommendation as to the means of financing the improvements proposed for the ensuing fiscal year. The council shall have the power to accept with or without amendments or reject the proposed program and proposed means of financing for the ensuing fiscal year; and may from time to time during the fiscal year amend by ordinance adopted by at least five affirmative votes, the program previously adopted by it, or the means of financing the whole or any part thereof or both, provided that the amendment shall have been recommended by the mayor and further, provided such additional funds are available in the general fund or in any other fund of the city available therefor. The council shall adopt a capital budget prior to the beginning of the fiscal year in which the budget is to take effect. No appropriations for a capital improvement project contained in the capital budget shall lapse until the purpose for which the appropriation was made shall have been accomplished or abandoned, provided that any project shall be deemed to have been abandoned if three fiscal years lapse without any expenditure from or encumbrance of the appropriation therefor. Any such lapsed appropriation shall be applied to the payment of any indebtedness incurred in financing the project concerned and if there be no such indebtedness shall be available for appropriation.

Section 57. Certification of Funds; Penalties for Violation. No payment shall be made and no obligation incurred by or on behalf of the city except in accordance with an appropriation duly made and no payment shall be

made from or obligation incurred against any allotment or appropriation unless the Director of Finance shall first certify that there is a sufficient unexpended and unencumbered balance in such allotment or appropriation to meet the same; provided that nothing herein shall be taken to prevent the advance authorization of expenditures for small purchases as provided in subsection (e) of Section 64 of this chapter. Every expenditure or obligation authorized or incurred in violation of the provisions of this chapter shall be void. Every payment made in violation of the provisions of this chapter shall be deemed illegal and every official who shall knowingly authorize or make such payment or knowingly take part therein and every person who shall knowingly receive said payment or any part thereof shall be jointly and severally liable to the city for the full amount so paid or received. If any officer, member of the board, or employee of the city, shall knowingly incur any obligation or shall knowingly authorize or make any expenditure in violation of the provisions of this chapter or knowingly take part therein, such action shall be cause for his removal. Nothing in this section contained, however, shall prevent the making of contracts of lease or for services providing for the payment of funds at a time beyond the fiscal year in which such contracts are made, provided the nature of such transactions will reasonably require the making of such contracts.

Section 58. Reserve for Permanent Public Improvements. The council may by ordinance establish a reserve fund for permanent public improvements and may appropriate thereto any portion of the general fund cash surplus not otherwise appropriated at the close of any fiscal year. Appropriations from the said fund shall be made only to finance improvements included in the capital budget.

Section 59. Budget Continuation. Any official adopted budget in existence at the time that the council is first organized shall continue in force and effect during the balance of the city's then fiscal year, or until such time as the mayor may submit to the council and the council adopts, an amended, altered or revised budget for the balance of said fiscal year.

Section 60. Budget Summary. At the head of the budget there shall appear a summary of the budget, which need not be itemized further than by principal sources of anticipated revenue, stating separately the amount to be raised by property tax, kinds of expenditures itemized according to departments, doing so in such manner as to present to the taxpayers a simple and clear summary of the detailed estimates of the budget.

ARTICLE VI

DEPARTMENT OF FINANCE

Section 61. Director of Finance; appointment. There shall be a department of finance, the head of which shall be the Director of Finance, who shall be appointed by the mayor, subject to provisions of civil service or the merit system applicable to the city. He shall be the chief Financial Officer of the city.

Section 62. Director of Finance; qualifications. The director of finance shall be a person skilled in municipal accounting, taxation, and financial control.

Section 63. Director of Finance, surety bond. The Director of Finance shall provide a bond with such surety and in such amount as the council may require by resolution or ordinance. The premium on said bond shall be paid by the city.

Section 64. Director of Finance; powers and duties. The Director of Finance shall have general management and control of the several divisions and units of the Department of Finance. He shall have charge, subject to the direction and control of the mayor, of the administration of the financial affairs of the city, and to that end shall have authority and be required to:

(a) cooperate with the mayor in compiling estimates for the general fund, public utility and capital budgets;

(b) supervise and control all encumbrances, expenditures and disbursements to insure that budget appropriations are not exceeded;

(c) prescribe and install systems of accounts for all departments, offices, and agencies of the city and provide instructions for their use; and prescribe the form of receipts, vouchers, bills or claims to be used and of accounts to be kept by all departments, offices, and agencies of the city;

(d) require daily, or at such other intervals as he may deem expedient, a report of receipts from each of such departments, offices and agencies, and prescribe the time and the manner in which moneys received by them shall be paid to the office of the Director of Finance or deposited in a city bank account under his control;

(e) examine all contracts, purchase orders and other documents, except bonds and notes which create financial obligations against the city, and approve the same only upon ascertaining that money has been appropriated and

allotted therefor and that an unexpended and unencumbered balance is available in such appropriation and allotment to meet the same, provided that the Director of Finance may give advance authorization for the expenditure from any appropriation for the purchase of supplies, materials, or equipment of such sum, within the current allotment of such appropriation as he may deem necessary during a period of not to exceed the ensuing three calendar months for the purchase of items not to exceed in cost One Hundred Dollars for any one item, and immediately encumber such appropriation with the amount of such advance authorization, and thereafter, within the period specified, purchase orders for such items, to an aggregate not exceeding such authorization, shall be valid without the prior approval of the Director of Finance endorsed thereon, but each such purchase order shall be charged against such authorization and no such purchase order, which together with all such purchase orders previously charged with the period specified shall exceed the amount of such authorization shall be valid;

(f) have custody of all public funds belonging to or under the control of the city, or any office, department or agency of the city government and deposit all funds coming into his hands in such depositories as may be designated by resolution or ordinance of the council, or, if no such resolution or ordinance be adopted, by the mayor, subject to the requirements of law as to surety and the payment of interest on deposits. All such interest shall be the property of the city and shall be accounted for and credited to the proper account. He shall not be liable for any loss sustained as to funds of the city that are on deposit in such a designated bank or depository;

(g) audit and approve before payment, all bills, invoices,

payrolls and other evidences of claims, demands or charges against the city government and with the advice of the department of law, determine the regularity, legality and correctness of such claims, demands or charges;

(h) have custody of all investments and invested funds of the city or in its possession in a fiduciary capacity, unless otherwise provided by this chapter, or by law, ordinance or the terms of any trust, and the safeguarding of all bonds and notes of the city and the receipt and delivery of city bonds and notes for transfer, registration and exchange;

(i) have supervision over the preparation of bond ordinances, bonds, advertisements for sale of bonds, preparation of bond prospectuses, conduct of sale of bonds, and delivery of bonds, all subject to provisions of law and municipal ordinances, applicable thereto. Bonds shall be authenticated by the manual signature of the Director of Finance and shall bear the facsimile signature of the mayor and a facsimile of the seal of the city. Interest coupons transferable by delivery shall be attached to the bond and shall be authenticated by the facsimile signature of the Director of Finance;

(j) supervise and direct the placing of all types of insurance carried by the city where the premiums in whole or in part are paid by the city, or the premiums in whole or in part are withheld through the payrolls; the amount of all types of insurance on which the city pays the premiums in whole or in part shall be determined by the council after a recommendation by the mayor;

(k) submit to the mayor for presentation to the council not later than the twelfth day of each month, a statement showing in reasonable detail the revenues received by the city during the preceding month, the revenues received during that fiscal year up to and through the end of the preceding month, the expenditures made during the

preceding month, and the accumulated expenditures made during that fiscal year up to and through the end of the preceding month, together with a comparison of said items with the budget estimates;

(l) furnish to the head of each department, office or agency of the city a copy of that portion of the statement as required in item (k) of this section, as same is related to his department, office or agency;

(m) prepare and submit to the mayor at the end of each fiscal year, for the preceding year, a complete financial statement and report of the financial transactions of the city;

(n) designate, with the approval of the Mayor, and subject to the provisions of any merit or civil service system applicable to such city, an employee of the department of finance as deputy director of finance who during the temporary absence or incapacity of the director of finance shall have and perform all the powers and duties conferred or imposed upon the director of finance;

(o) protect the interests of the city by withholding the payment of any claim or demand by any person, firm or corporation against the city until any indebtedness or other liability due from such person, firm or corporation shall first have been settled and adjusted;

(p) collect all special assessments, license fees and other revenues of the city for whose collection the city is responsible and receive all money receivable by the city from the county, state or federal government, or from any court, or from any office, department or agency of the city;

(q) with approval of the mayor to inspect and audit any accounts or records of financial transactions which may be maintained in any office, department or agency of the city government apart from or subsidiary to the accounts kept in his office;

(r) supervise through the division of purchases as provided for in Section 67 of this chapter and be responsible for the purchase, storage and distribution of all supplies, materials, equipment and other articles used by any office, department or agency of the city government.

Section 65. When contracts and expenditures prohibited. No officer, department or agency shall, during any budget year, expend or contract to expend any money or incur any liability, or enter into any contract which by its terms involves the expenditure of money, for any purpose, in excess of the amounts appropriated for that general classification of expenditure pursuant to this chapter. Any contract, verbal or written, made in violation of this chapter shall be null and void. Nothing in this Section contained, however, shall prevent the making of contracts or the spending of money for capital improvements to be financed in whole or in part by the issuance of bonds, nor the making of contracts of lease or for services for a period exceeding the budget year in which such contract is made, when such contract is permitted by law.

Section 66. Fees shall be paid to city government. All fees received by any officer or employee of the city, shall belong to the city government and shall be paid daily to the department of finance.

Section 67. Division of purchases. There shall be established in the department of finance a division of purchases, the head of which shall be the city purchasing agent. The purchasing agent, pursuant to rules and regulations established by resolution or ordinance, shall contract for, purchase, store and distribute all supplies,

materials and equipment required by any office, department or agency of the city government. The purchasing agent shall also have power and shall be required to:

(a) Establish and enforce specifications with respect to supplies, materials, and equipment required by the city government;

(b) Inspect or supervise the inspection of all deliveries of supplies, materials and equipment, and determine their quality, quantity and conformance with specifications;

(c) Have charge of such general storerooms and warehouses as the council may provide by resolution or ordinance;

(d) Transfer to or between offices, departments or agencies, or sell surplus, obsolete, or unused supplies, material and equipment;

(e) Perform such other duties as may be imposed upon him by resolution or ordinance.

Section 68. Competitive bidding. Before the purchasing agent makes any purchase of or contract for supplies, materials or equipment, he shall give ample opportunity for competitive bidding, under such rules and regulations and with such exceptions as the council may prescribe by resolution or ordinance, provided, however, that the council shall not exempt individual contracts, purchases, or sales from the requirement of competitive bidding.

Section 69. Contracts for city improvements. Any city improvement costing more than $2,000 shall be executed by contract except where such improvement is authorized by the council to be executed directly by a city department in conformity with detailed plans, specifications and estimates. All such contracts for more than $2,000 shall be

awarded to the lowest responsible bidder after such public notice and competition as may be prescribed by resolution or ordinances, provided the mayor shall have the power to reject all bids and advertise again. Alteration in any contract may be made when authorized by the council upon the written recommendation of the mayor. Nothing in this or Section 68 shall be construed to supersede or nullify provisions of state law requiring or governing competitive bidding.

Section 70. Accounting control of purchase. All purchases made and contracts executed by the purchasing agent shall be pursuant to a written requisition from the head of the office, department or agency whose appropriation will be charged, and no contract or order shall be issued to any vendor unless and until the director of finance certifies that there is to the credit of such office, department or agency, a sufficient unencumbered appropriation balance to pay for the supplies, materials, equipment or contractual service for which the contract or order is to be issued.

Section 71. Borrowing in anticipation of revenues. In any budget year, in anticipation of the collection or receipt of revenues of the budget year, the council may by resolution authorize the borrowing of money by the issuance of negotiable notes of the city, each of which shall be designated "revenue note for the year 19____ (stating the budget year)". Such notes may be renewed from time to time; but all such notes, together with the renewals thereof, shall mature and be paid not later than the end of the fiscal year after the budget year in which the original notes have been issued. Such borrowing shall be subject to any limitation on amount provided by statute.

Section 72. Borrowing to meet emergency appropriations. In the absence of unappropriated available revenues to meet emergency appropriations under the provisions of Section 53, the council may by resolution authorize the issuance of notes, each of which shall be designated "emergency note" and may be renewed from time to time, but all such notes of any fiscal year and any renewals thereof shall be paid not later than the last day of the fiscal year next succeeding the budget year in which the emergency appropriation was made.

Section 73. Notes redeemable prior to maturity. No notes shall be made payable on demand, but any note may be made subject to redemption prior to maturity on such notice and at such time as may be stated in the note.

Section 74. Sale of notes; report of sale. All notes issued pursuant to this chapter may be sold at not less than par and accrued interest at private sale without previous advertisement.

ARTICLE VII

SUCCESSION IN GOVERNMENT

Section 75. Rights of officers and employees preserved. Nothing in this chapter contained, except as specifically provided, shall affect or impair the rights or privileges of officers or employees of the city or of any office, department or agency existing at the time when this chapter shall take effect or any provision of law in force at the time when the Mayor-Council form of government shall become applicable and not inconsistent with the provisions of this

chapter in relation to the personnel, appointment, ranks, grades, tenure of office, promotion, removal, pension and retirement rights, civil rights or any other rights or privileges of officers or employees of the city or any office, department or agency thereof.

Section 76. Continuance of present officers. All persons holding administrative office at the time the Mayor-Council form of government becomes effective shall continue in office and in the performance of their duties until provisions have been made in accordance therewith for the performance of such duties or the discontinuance of such office. The powers conferred and the duties imposed upon any office, department or agency of the city by the laws of the State, if such office, department or agency shall be abolished by this chapter, or under its authority, be thereafter exercised and discharged by the office, department or agency designated by the council unless otherwise provided herein.

Section 77. Status of officers and employees holding positions when the Mayor-Council form of government becomes effective. Any person holding an office or position in the classified service of the city under any civil service or merit system applicable to the city when the Mayor-Council form of government shall become effective shall be continued as such officer or employee in the classified service of the city under the Mayor-Council form of government and with the same status, rights and privileges and subject to the same conditions under such applicable civil service or merit system as if the Mayor-Council form of government had not become applicable.

Section 78. Transfer of records and property. All records, property and equipment whatsoever of any office, department or agency or part thereof, all the power and duties of which are assigned to any other office, department or agency by this chapter, shall be transferred and delivered to the office, department, or agency to which such powers and duties are so assigned. If part of the powers and duties of any office, department or agency or part thereof are by this chapter assigned to another office, department or agency, all records, property and equipment relating exclusively thereto shall be transferred and delivered to the office, department or agency to which such powers and duties are so assigned.

Section 79. Continuity of offices, departments or agencies. Any office, department or agency provided for in this chapter with a name or with powers and duties the same or substantially the same as those of an office, department or agency heretofore existing shall be deemed to be a continuation of such office, department or agency and until otherwise provided, shall exercise its powers and duties in continuation of their exercise by the office, department or agency by which the same were heretofore exercised and, until otherwise provided, shall have power to continue any business, proceeding or other matter within the scope of its regular powers and duties commenced by an office, department or agency by which such powers and duties were heretofore exercised. Any provision in any law, rule, regulation, contract, grant or other document relating to such a formerly existing office, department or agency, shall, so far as not inconsistent with the provisions of this chapter, apply to such office, department or agency provided for by this chapter.

Section 80. Continuance of contracts and public improvements. All contracts entered into by the city, or for its benefit, prior to the application to such city of the Mayor-Council form of government, shall continue in full force and effect. Public improvements for which legislative steps have been taken under laws existing at the time of the organization under the Mayor-Council form of government may be carried to completion as nearly as practicable in accordance with the provisions of such existing laws.

Section 81. Pending actions and proceedings. No action or proceedings, civil or criminal, pending at the time of the organization under the Mayor-Council form of government, brought by or against the city or any office, department or agency or officer thereof, shall be affected or abated by the change to the Mayor-Council form of government or by anything contained in this chapter; but all such actions or proceedings may be continued notwithstanding that functions, powers and duties of any office, department or agency or officer party thereto may by or under this chapter be assigned or transferred to another office, department or agency or officer, but in that event the same may be prosecuted or defended by the head of the office, department or agency to which such functions, powers and duties have been assigned or transferred by or under this chapter.

Section 82. Pension and Relief Funds. All laws and parts of laws relating to pensions or retirement and relief funds for policemen, firemen and other employees of the city, contained in the general or local laws of the State or in Title 62 of the Code of Alabama, as amended, as the same may apply and be in effect with respect to the City of Mobile at the time when such city shall become governed by the

provisions of this chapter, shall continue in full force and effect, and without interruption or change as to any rights which have been acquired thereunder.

Section 83. Park, playground and fairground authority. All laws and parts of laws relating to establishment of an authority for fairgrounds, parks, exhibits, exhibitions and other installations, facilities and places for the amusement, entertainment, recreation and cultural development of the citizens of a city, and for the powers, authority, mode of financing and conduct of the same, contained in the general or local laws of the State or in Title 62 of the Code of Alabama, as amended, as the same may apply and be in effect with respect to any city at the time when such city shall become organized under the provisions of this chapter, shall continue in full force and effect, and without interruption or change as to the establishment or conduct of any authority created thereunder, after application of the Mayor-Council form of government to such city.

Section 84. Continuance of ordinances and resolutions. All ordinances and resolutions of the city in effect at the time of this court's decree dated the 21st day of October, 1976, as last amended, and the Mayor-Council form of government herein set up becomes effective shall continue in effect unless and until changed or repealed by the council.

ARTICLE VIII

GENERAL PROVISIONS

Section 85. Removal of officers and employees. Subject to the provisions of any civil service or merit system applicable to the city, any officer or employee to whom the mayor, or a head of any office, department or agency, may appoint a successor, may be removed by the mayor or other appointing officer at any time, and the decision of the mayor, or other appointing officer shall be subject to appeals therefrom, if any, provided by applicable law.

Section 86. Right of mayor and other officers in council. The mayor, the heads of all departments, and such other officers of the city as may be designated by the council, shall be entitled to attend meetings of the council, but shall have no vote therein, the mayor shall have the right to take part in the discussion of all matters coming before the council, and the directors and other officers shall be entitled to take part in all discussions of the council relating to their respective offices, departments or agencies.

Section 87. Investigations by council or mayor. The council, the mayor, or any person or committee authorized by either of them, shall have power to inquire into the conduct of any office, department, agency or officer of the city and to make investigations as to municipal affairs, and for that purpose may subpoena witnesses, administer oaths, and compel the production of books, papers and other evidence.

Section 88. Contracts extending beyond one year. No contract involving the payment of money out of the

appropriation of more than one year shall be made for a period of more than five years, nor shall any such contract be valid unless made or approved by resolution or ordinance.

Section 89. Employees not to be privately interested in city's contracts. No city employee shall be interested, directly or indirectly, in any contract for work or material, or the profits thereof, or services to be furnished or performed for the city. The mayor and councilmen shall recuse themselves from any and all official acts or duties in which they have in interest, directly or indirectly, in any contract for work or material, or the profits thereof, or services to be furnished or performed for the city.

Section 90. Official Bonds. The director of finance, and such other officers or employees as the council may by general ordinance require so to do, shall give bond in such amount with such surety as may be approved by the council. The premiums on such bonds shall be paid by the city.

Section 91. Oath of Office. Every officer of the city shall, before entering upon the duties of his office, take and subscribe to the following oath or affirmation, to be filed and kept in the office of the city clerk:

> "I solemnly swear (or affirm) that I will support the Constitution and will obey the laws of the United States and of the State of Alabama, and that I will, in all respects, observe the provision of the ordinances of the City of Mobile, and will faithfully discharge the duties of the office of _____."

Section 92. Reapportionment. Whenever there shall be a change in the population in any of the nine districts

heretofore established, evidenced by a federal census of population published following a decennial federal census hereafter taken beginning in 1990, there shall be a reapportionment of the council districts in the manner hereinafter provided.

(1) The mayor shall within six months after the publication of the 1990 federal census, and each decennial federal census thereafter of the population of the city, file with the council a report containing a recommended plan for the reapportionment of the council district boundaries to comply with the following specifications:

(a) Each district shall be formed of contiguous and to the extent reasonably possible, compact territory, and its boundary lines shall be the centerlines of streets or other well defined boundaries.

(b) Each district shall contain as nearly as is reasonable the same population.

(2) The report shall include a map and description of the districts recommended and shall be drafted as a proposed ordinance and considered by the council as other ordinances are considered. Once filed with the clerk, the report shall be treated as an ordinance introduced by a council member.

(3) The council shall enact a redistricting ordinance within six months after receiving such report. If the council fails to enact the redistricting ordinance within the said six months, the redistricting plan submitted by the mayor shall become effective without enactment by the council, as if it were a duly enacted ordinance.

(4) Such redistricting ordinance shall not apply to any regular or special election held within six months after its becoming effected. No incumbent councilman or member of the board or commission shall be deprived of his unexpired term of office because of such redistricting.

APPENDIX B [To Court Order]
[Caption omitted in printing]

PLAINTIFFS' PLAN H

Pursuant to the instructions of this Court plaintiffs herein submit a plan for nine districts in the City of Mobile and a ward breakdown showing the number of black citizens residing in each ward according to the 1970 Census.

The black population figures used in this plan and listed in the ward summary are *total* black population figures recently calculated by Mr. Still and Mr. Menefee from 1970 Census data, as the Court requested. They should be distinguished from the "weighted" black population figures set out in plaintiffs' earlier submissions, which are based on black voter age percentages.

This plan has a deviation of three percent. It involves five changes in the present ward structure. Only one of these changes would require the creation of a new ward so as to maintain the present house and senate districts. Of course, the election officials might desire to create additional wards for their own or the voters' convenience.

Ward 33-99-1 is split into east and west wards. The dividing line starts at the south of Stanton, north to Costarides, west of Summerville, north to Andrews, east to the ward line:

East	868	Population	848	Blacks
West	11,841	"	11,841	"

The voters in the eastern area could be assigned to vote in MW-33-99-2.

Ward 35-103-1 is split into east and west wards. The dividing line starts at the west, east on Davis Avenue to

Kennedy, south to the ward line:

East	7,098	Population	7,056	Blacks
West	1,848	"	1,845	"

This requires the creation of a new ward in the western section since shifting those voters into the adjoining MW-33-99-3 would cross a house and senate line.

Ward 35-103-3 is split north and south. Begin on the north at Broad Street, south to Elmira, east to Dearborn Street, south to New Jersey, east to Warren Street, north to Delaware, east to Interstate 10, south to Virginia Street, east to the Mobile Bay:

North	3,818	Population	3,367	Blacks
South	5,085	"	2,801	"

The voters in the northern area could be assigned to vote in MW-35-103-2.

Ward 34-100-3 is split by a line beginning on the[e]ast at Old Shell Road, west to East Drive, south to North Shenandoah, west to East Cumberland, south to Ridgefield Road, south on Ridgefield to the ward line:

Southeast	772	Population	0	Blacks
Northwest	6,235	"	1,567	"

The voters in the southeastern area could be assigned to vote in MW-34-100-2.

Ward 35-104-2 is split into a "Brookley ward" and a west ward. The Brookley ward is bounded on the north by the ward boundary; on the west by Eslava Creek and Dog River; on the south by Old Military Road, Dauphin Island Parkway, Rosedale Road, the Brookley Boundary, and Perimeter Road; on the East by Mobile Bay:

Brookley	1,426	Population	28	Blacks
West	2,088	"	249	"

The voters in the western area could be assigned to vote in MW-35-104-3.

Description of Districts

District	*Ward*	*Population*	*Black*
1	33-98-1	9,438	6,065
	33-99-1-W	11,841	11,841
		21,279	17,906
2	33-99-1-E	868	848
	33-99-2	8,664	8,505
	33-99-3	4,510	4,483
	34-102-2	4,896	173
	35-103-1-W	1,848	1,845
		20,786	15,854
3	33-99-4	5,536	5,521
	35-103-1-E	7,098	7,056
	35-103-2	4,672	2,170
	35-103-3-N	3,818	3,367
		21,124	18,114
4	35-103-3-S	5,085	2,801
	34-102-3	4,244	56
	34-102-4	2,704	4
	34-102-6	5,280	234
	34-102-7	3,872	2,975
		21,185	6,070

5	35-103-4	11,419	4,331
	35-104-1	8,091	512
	35-104-2-Brookley	1,426	28
		20,936	4,871
6	35-104-2-W	2,088	249
	35-104-3	8,416	571
	35-104-4	6,029	52
	35-104-5	4,767	87
		21,294	959
7	34-100-1	3,122	169
	34-100-2	2,078	164
	34-101-4	5,833	0
	34-101-5	5,664	193
	34-101-6	3,489	0
	34-100-3-SE	772	0
		20,958	526
8	34-102-5	6,914	0
	34-102-1	4,793	1,093
	34-101-2	4,196	154
	34-101-3	5,520	85
		21,423	1,332
9	34-101-1	7,310	9
	34-100-3-NW	6,235	1,567
	34-100-4	7,760	19
		21,305	1,595

Analysis

District	Population	% of Optimum	#Black	%Black
1	21,279	100.7	17,906	84
2	20,786	98.4	15,854	76
3	21,124	100.0	18,114	86
4	21,185	100.3	6,070	29
5	20,936	99.0	4,871	23
6	21,294	100.7	959	5
7	20,958	99.3	526	3
8	21,423	101.4	1,332	6
9	21,305	100.1	1,595	7
Range	637	3.0		

Ward Population

MW	Population	#Black
33-98-1	9,438	6,065
33-99-1	12,709	12,689
33-99-2	8,664	8,505
33-99-3	4,510	4,483
33-99-4	5,536	5,521
34-100-1	3,122	169
34-100-2	2,078	164
34-100-3	7,007	1,567
34-100-4	7,760	19
34-101-1	7,310	9
34-101-2	4,196	154
34-101-3	5,520	85
34-101-4	5,833]	
34-101-5	5,664]	193

34-101-6	3,489]	
34-102-1	4,793	1,093
34-102-2	4,896	173
34-102-3	4,244	56
34-102-4	2,704	4
34-102-5	6,914	0
34-102-6	5,280	234
34-102-7	3,872	2,975
35-103-1	8,946	8,901
35-103-2	4,672	2,170
35-103-3	8,903	6,168
35-103-4	11,419	4,331
35-104-1	8,091	512
35-104-2	3,514	277
35-104-3	8,410	571
35-104-4	6,029	52
35-104-5	4,767	87
	190,290	67,227

Exhibit A hereto shows the proposed district boundaries of Plan H on a city map.

Respectfully submitted this 2nd day of November, 1976.

CRAWFORD, BLACKSHER,
FIGURES & BROWN
1407 DAVIS AVENUE
MOBILE, ALABAMA 36603

By: /s/ J. U. Blacksher
J.U. BLACKSHER
LARRY MENEFEE

EDWARD STILL, ESQUIRE
SUITE 601 - TITLE BUILDING
2030 THIRD AVENUE NORTH
BIRMINGHAM, ALABAMA 35203

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CHARLES WILLIAMS, ESQUIRE
SUITE 2030
10 COLUMBUS CIRCLE
NEW YORK, N.Y. 10019

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I do hereby certify that on this the 2nd day of November, 1976, I served a copy of the foregoing PLAINTIFFS' PLAN H upon counsel of record, Charles Arendall, Esquire, David Bagwell, Esquire, Post Office Box 123, Mobile, AL 36601, depositing same in United States Mail, postage prepaid or by hand.

/s/ J. U. Blacksher
Attorney for Plaintiffs

APPENDIX E

[caption omited in printing]

ORDER

The plaintiffs on the 28th day of April, 1978, petitioned this court to set an election date for the mayor and councilmen pursuant to this court's order dated October 21, 1976, which was affirmed by the Fifth Circuit Court of Appeals on March 29, 1978.

The defendants petitioned the United States Supreme Court to stay the mayor and councilmen election pending the defendants' petition for certiorari and the Supreme Court's disposition of that petition. On May 15, 1978, by a 7-2 vote, the United States Supreme Court denied the defendants' petition for a stay.

On May 16, 1978, after a hearing on the plaintiffs' petition, with attorneys for all parties present, the court orally ordered, and hereby in writing orders, the election of the mayor and councilmen pursuant to this court's decree dated October 21, 1976, to take place on November 21, 1978, with a runoff, if necessary, on December 12, 1978. It was further stated that the term of four years of the mayor and councilmen elected at that time would be shortened until such time as their successors have been elected and qualified to take office on the first Monday in October, 1981.

This written order is to affirm and supplement those orders.

For the first elections only, to wit, the November 21, 1978, and December 12, 1978, election and runoff, Appendix "A" of this court's order dated March 9, 1977, is MODIFIED and CHANGED as follows:

At page 1, Chapter I, Article I, Section 2, the last line is modified by changing

"the first Monday in October following the elections"

to read

"January 2, 1979".

At page 2, Chapter I, Article I, Section 2, line 1 is modified by changing

"for four years"

to read

"until the first Monday in October, 1981".

At page 2, Chapter I, Article I, Section 5, line 5 is modified by changing

"the first Monday in October following the date the election of all nine councilmen is completed"

to read

"January 2, 1979".

At page 5, Chapter I, Article III, Section 10—Statement of Candidacy—line 8 is modified by changing

"August"

to read

"November".

At page 5, Chapter I, Article III, Section 11, last line, the following is modified by changing

"the first Monday in October following his election"

to read

"January 2, 1979".

At page 9, Chapter I, Article III, Section 20, line 15 is modified by changing

"the first Monday in October next following its election"

to read

"January 2, 1979".

At page 16, Chapter I, Article IV, Section 27, line 6 is modified by changing

"the first Monday in October in the same year of election and shall serve for four years."

to read

"January 2, 1979, and shall serve until his successor has been elected and qualified for a new term beginning the first Monday in October, 1981."

At page 17, Chapter I, Article IV, Section 28, line 12 is modified by changing

"August"

to read

"November".

In the event the United States Supreme Court should grant certiorari in this matter before November 21, 1978, the election ordered herein shall be stayed and this order, in that event, will be null and void.

Done, this the 31st day of May, 1978.

/s/ Virgil Pittman

UNITED STATES DISTRICT JUDGE

APPENDIX F

Alabama Act No. 281 (Acts 1911, p. 330), as amended, Code of Alabama 1975 §§11-44-70 through 11-44-105 (1977)

§11-44-70. Applicability of article.

This article shall only apply to cities and towns which have heretofore adopted the same or which may hereafter elect to operate under the provisions herein contained. (Acts 1911, No. 281, p. 330; Code 1940, T. 37, §89.)

§11-44-71. Procedure for adoption—Generally.

Any city or town may adopt and become organized under the commission form of government provided in this article by proceeding as hereinafter provided. (Acts 1911, No. 281, p. 330; Code 1940, T. 37, §90.)

§11-44-72. Same—Election.

Upon the presentation of a petition signed by such number of qualified electors of any city or town to which this article is desired to apply as will equal or exceed one percent of the population of such city or town according to the last preceding federal census to the judge of probate of the county in which such city or town is located, asking that the proposition of organizing under this article be submitted to the qualified voters of such city or town, the judge of probate shall examine said petition and determine whether or not the same is signed by the requisite number of qualified electors for such city or town to authorize such election in such city or town for the purpose of adopting the provisions of this article and, if such probate judge shall find that said petition contains the requisite number of electors

to authorize such an election, he shall, within 10 days from the receipt of said petition, certify such fact to the mayor of the city or town in which such election is so petitioned. The mayor or other chief executive of such city or town, immediately upon the receipt of such certificate from the probate judge, shall call a special election to be held within 40 days thereafter for the purpose of determining whether or not said city or town shall adopt the commission form of government hereby authorized and shall give notice of the time and purpose of such election by publication once each week for four consecutive weeks in some newspaper, if any, published in said city or town and, if there be no such newspaper, then by notice posted at five public places in said city or town for 30 days. If said plan is not adopted at the special election so called, the question of adopting said plan shall not be resubmitted to the voters of said city or town for adoption within two years thereafter, and then the question to adopt said plan may be resubmitted in the manner above provided.

All qualified electors of said city or town may participate in said election, and the question submitted shall be whether or not the city or town named shall adopt the commission form of government as provided in this article, and such question shall be plainly printed upon the ballot and following the said question shall be printed the word "Yes" with a blank opposite thereto and in the next line the word "No" with a blank opposite thereto. The voter shall mark his ballot with a cross mark before or after the word which expresses his choice. No other proposition shall be submitted to the voters at such election upon said ballot. The election shall be conducted, the expense paid, the vote canvassed and the result declared in the same manner as is or may be provided by law in respect to other municipal elections.

If the majority of the votes cast shall be "Yes" or in favor of such proposition, the provisions of this article shall thereby be adopted for said city, effective October 1 of the general municipal election year next following said election, and the mayor shall transmit to the governor, to the secretary of state and to the judge of probate of the county, each, a certificate stating that such proposition was adopted for said city. (Acts 1911, No. 281, p. 330; Code 1940, T. 37, §91.)

§11-44-73. Commissioners—Election, terms of office, etc., generally.

* * *

(Acts 1915, No. 749, p. 869; Acts 1939, No. 246, p. 408; Code 1940, T. 37, §92.)

§11-44-74. Same—Election, terms of office, etc., of commissioners elected after September 1, 1945.

* * *

(Acts 1939, No. 246, p. 408; Code 1940, T. 37, §93; Acts 1951, No. 640, p. 1095.)

§11-44-75. Same—Designation of positions and election thereto.

Whenever there are one, two or three commissioners to be elected, all candidates for such position or positions shall qualify as provided in this article. The positions to be held by the commissioners shall be numbered one, two and three and any candidate who shall qualify as provided in this

article shall designate whether he is seeking to be elected to the position numbered one, two or three. The names of all such candidates shall be placed upon the ballot in three designated groups under the headings of those seeking election to the positions numbered one, two and three, respectively. All persons qualified to vote in such election shall be entitled to vote for one candidate for the position numbered one, for one candidate for the position numbered two and for one candidate for the position numbered three. Whenever a candidate for any one of the numbered positions receives a majority of all votes cast for all candidates seeking election to that position, then he shall be declared elected commissioner to the position thus numbered, and when no candidate seeking a numbered position receives a majority, then and in that event, the two candidates receiving the highest number of votes shall be declared eligible for a second election. Such second election shall be held not less than 10 nor more than 15 days from the date of the first election. The candidate who receives the highest number of votes in the second election shall be declared elected commissioner to such position. (Acts 1939, No. 246, p. 408; Code 1940, T. 37, §94; Acts 1945, No. 295, p. 490, §1.)

§11-44-76. Same—Qualifications; filling of vacancies caused by ineligibility.

The commissioners provided for by this article shall be elected by the vote of the legally qualified voters, and no person shall be eligible for such office who shall not be over the age of 19 years at the time he shall become a candidate or shall not be duly qualified to vote in the election at which he shall be elected.

In case any person, after he shall have been elected and duly qualified as commissioner, shall be declared ineligible to hold such office, a successor shall be chosen as in the case of a vacancy caused by death, resignation or any other cause. (Acts 1911, No. 281, p. 330; Code 1940, T. 37, §102.)

§11-44-77. Same—Filling of vacancies caused by death, resignation or removal.

* * *

(Acts 1911, No. 281, p. 330; Acts 1939, No. 352, p. 481; Code 1940, T. 37, §104.)

§11-44-78. Same—Filling of two or more simultaneous vacancies.

* * *

(Acts 1911, No. 281, p. 330; Code 1940, T. 37, §115.)

§11-44-79. Same—Oath; bond.

* * *

(Acts 1911, No. 281, p. 330; Code 1940, T. 37, §103.)

§11-44-80. Same—Compensation.

* * *

(Acts 1911, No. 281, p. 330; Acts 1939, No. 283, p. 440; Code 1940, T. 37, §105; Acts 1945, No. 295, p. 490, §4; Acts 1953, No. 315, p. 372; Acts 1955, No. 396, p. 931.)

§11-44-81. Same—Designation; qualification for and taking of office.

The commissioners provided for in this article shall be known collectively as the board of commissioners of such city or town and shall have the powers and duties provided in this article. Each of said commissioners shall qualify for office in the manner prescribed in sections 11-44-76 and 11-44-79 on or before the second Monday following the date of the election by which the board is filled or completed. As soon as they thus shall have qualified for office, all three of said commissioners shall forthwith take office and enter upon their duties. (Acts 1939, No. 289, p. 441, §1; Code 1940, T. 37, §95; Acts 1945, No. 295, p. 490, §2.)

§11-44-82. Same—Meetings.

* * *

(Acts 1927, No. 390, p. 461; Code 1940, T. 37, §98.)

§11-44-83. Mayor-president of board of commissioners.

Immediately upon said commissioners taking office they, by a majority vote, shall elect one of their number as mayor, and he shall be president of the board of commissioners of said city or town; and, in addition to the other duties and powers given him by the provisions of this article, he shall be invested with all of the powers, jurisdiction and functions and be charged with all the duties which may be conferred or imposed upon him by said board of commissioners, except that he shall not have the power to veto any ordinance. The mayor-president of the board of commissioners may hold that office for one year, but he may not be elected to succeed himself. (Acts 1939, No. 289, p. 441; Code 1940, T. 37, §95; Acts 1945, No. 295, p. 490, §2.)

§11-44-84. Powers and authority of board of commissioners upon organization of commission form of government; abolition of certain boards, commissions and officers; continuation of corporate existence, territorial limits, etc., of municipality.

The commissioners of such city or town, to be known as the board of commissioners of such city or town, shall have, possess and exercise all the powers and authority, legislative, executive and judicial, theretofore possessed by the mayor or governing body or bodies of said city or town, by whatsoever name called, all boards of public works, boards of police commissioners and any and all other boards and commissions, except school boards and other commissions and boards having in charge educational matters. All boards and commissions whose powers are hereby conferred upon such new board of commissioners shall stand abolished upon the organization of such new board of commissioners. Such city or town shall continue its existence as a body corporate without change of name and shall continue to be subject to all the duties and obligations then pertaining to or incumbent upon it as a municipal corporation and shall continue to enjoy all the rights, immunities, powers and franchises then enjoyed by it, as well as those that may hereafter be granted to it. All laws governing such city or town and not inconsistent with the provisions of this article shall apply to and govern said city or town after it shall become organized under the commission form of government provided by this article. All bylaws, ordinances and resolutions lawfully passed and in force in any such city or town under its former organization shall remain in force until altered or repealed according to the provisions of this article. The territorial limits of such city or town shall remain the same as under its

former organization, but all commissioners shall be elected from the city or town at large. All rights, powers and property of every description which were vested in said city or town shall vest in it under the organization provided for in this article as though there had been no change in the organization of said city or town, and no right or liability, either in favor of or against it, and no action or prosecution of any kind shall be affected by such change, unless otherwise expressly provided for by the terms of this article. (Acts 1911, No. 281, p. 330; Code 1940, T. 37, §96.)

§11-44-85. Appointment, etc., of officers and employees generally; distribution of executive and administrative powers and duties among departments.

Every city or town adopting the form of government provided for by this article shall be governed and managed by the board of commissioners provided for herein.

* * *

(Acts 1935, No. 505, p. 1083; Code 1940, T. 37, §97; Acts 1955, No. 557, p. 1219.)

§11-44-86. Assignment or delegation of powers and duties of board of commissioners.

* * *

(Acts 1927, No. 390, p. 461; Code 1940, T. 37, §98.)

§11-44-87. Enactment of resolutions, bylaws or ordinances generally.

* * *

(Acts 1927, No. 390, p. 461; Code 1940, T. 37, §98.)

§11-44-88. Procedure for adoption of resolutions, bylaws or ordinances granting franchises, etc., for use of streets, public highways, etc.; manner in which franchises, etc., extended, enlarged, etc.

* * *

(Acts 1911, No. 281, p. 330; Code 1940, T. 37, §99.)

§11-44-89. Procedure for letting of contracts for construction, improvement, etc., of streets, highways, etc.

* * *

(Acts 1927, No. 390, p. 461; Code 1940, T. 37, §98.)

§11-44-90. Elections for office of commissioner—Filing and form of statement of candidacy, etc.

In every city or town which shall adopt or shall have adopted the provisions of this article, an election shall be held on the second Monday in September of each year in which the term of office of a commissioner shall expire. Any person desiring to become a candidate for commissioner at any election which may be held under the terms of this article may become such candidate by filing in the office of the mayor of said city or town, if at the first election of commissioners under this article, or with the board of commissioners at any subsequent election, a statement of such candidacy, accompanied by affidavit taken and certified by said mayor, a member of said board of commissioners or by a notary public that such person is

duly qualified to hold the office for which he desires to become a candidate. Such statement shall be filed at least 20 days before the day set for such election and shall be substantially in the following form:

"State of Alabama, ... County. I, the undersigned, being first duly sworn, depose and say that I am a citizen of the city (or town) of ..... in said state and county and reside at ..... in said city (or town); that I desire to become a candidate for the office of commissioner in said city (or town) for the term ending September 30th, 19 . . , at the election for said office to be held on the ..... day of .....; that I am duly qualified to hold said office if elected thereto, and I hereby request that my name be printed upon the official ballot at said election. (Signed) ..... Subscribed and sworn to before me by said ..... on this the ..... day of ....., 19 . . , and filed in this ofice for record on said day ..... (style of officer)."

§11-44-91. Same—Ballots; voting.

At elections for commissioners under this article the ballots shall be substantially in the following form:

For commissioner for position numbered 1 (or position numbered 2, or position numbered 3, as the case might be) of the city (or town) of ..... (insert name of city or town) for term ending September 30, 19 ....

.....

A.B.

.....

C.D.

.....

E.F.

.....

G.H.

.....

I.J.

.....

K.L.

.....

M.N.

.....

At such election the names of all candidates for commissioner who have qualified as such as provided in this article shall be printed on the ballots in alphabetical order. If more than one office is to be filled, the tickets shall be extended so as to likewise present the names of the candidates for the other offices. Each qualified elector may vote for his choice for each office to be filled. No defect in the form of the ballot or technicality or inaccuracy in such election or in the call, notice or conduct thereof shall invalidate such election if the same was in substance fairly conducted and the will of the people fairly expressed thereat.

In those municipalities where voting machines have been adopted as the means for registering or recording and computing the vote at all elections held in such municipalities, the list of candidates on the voting machines shall be so placed on the machine as to permit the voting for candidates to be conducted under the laws of this state applicable to voting machines, and the election shall be conducted in compliance with and conformity to such laws. Except as is otherwise provided in this article, all elections for commissioners hereunder shall be conducted as provided by the general laws of this state applicable thereto and at the expense of the city or towns in which such election is held. (Acts 1911, No. 281, p. 330; Acts 1939, No. 246, p. 408; Code 1940, T. 37, §101; Acts 1945, No. 295, p. 490, §3.)

§11-44-92. Filing and publication of statement of campaign expenses, etc., by commissioners.

* * *

(Acts 1911, No. 281, p. 330; Code 1940, T. 37, §107.)

§11-44-93. Appointment of municipal employees.

* * *

(Acts 1911, No. 281, p. 330; Code 1940, T. 37, §106.)

§11-44-94. Conflicts of interest of municipal officers and employees.

* * *

(Acts 1911, No. 281, p. 330; Code 1940, T. 37, §108.)

§11-44-95. Publication, etc., of monthly statement of receipts and expenses, etc.; examination of books and accounts.

* * *

(Acts 1911, No. 281, p. 330; Code 1940, T. 37, §109.)

§11-44-96. Maintenance of record books by probate judges and compensation therefor; fee for examination of petitions for elections.

* * *

(Acts 1911, No. 281, p. 330; Code 1940, T. 37, §112.)

§11-44-97. Use of influence or contribution of money, etc., in elections for commissioners by municipal officers or employees.

* * *

(Acts 1911, No. 281, p. 330; Code 1940, T. 37, §108.)

§11-44-98. Solicitation of votes by municipal employees.

* * *

(Acts 1911, No. 281, p. 330; Code 1940, T. 37, §110.)

(Acts 1911, No. 281, p. 330; Code 1940, T. 37, §110.)

§11-44-99. Payment, etc., of persons to solicit votes; acceptance of pay, etc., to solicit votes.

* * *

(Acts 1911, No. 281, p. 330; Code 1940, T. 37, §113.)

§11-44-100. Applicability of general state laws as to municipal elections.

All general laws of this state regulating and prescribing the conduct of municipal elections and the qualifications and registration of voters thereat shall apply to elections under this article, except when in conflict with this article. (Acts 1911, No. 281, p. 330; Code 1940, T. 37, §111.)

§11-44-101. Requirements, etc., as to petitions.

* * *

(Acts 1911, No. 281, p. 330; Code 1940, T. 37, §114.)

§11-44-102. Certain persons not to receive profits, wages, etc., from municipality.

* * *

(Acts 1911, No. 281, p. 330; Code 1940, T. 37, §116.)

§11-44-103. Certain persons not to become officers or employees of municipality.

* * *

(Acts 1911, No. 281, p. 330; Code 1940, T. 37, §117.)

§11-44-104. Commissioners, officers or employees to receive regular compensation only.

* * *

(Acts 1911, No. 281, p. 330; Code 1940, T. 37, §118.)

§11-44-105. Adoption of ordinances by initiative and referendum.

* * *

(Acts 1915, No. 749, p. 869; Code 1940, T. 37, §119.)

APPENDIX G

Alabama Act No. 823 (Acts 1965, p. 1539)

Act No. 823 **S. 138—Tyson**

AN ACT

To provide further for the form of government of cities having populations of not less than 200,000 nor more than 300,000, according to the most recent federal decennial census, regulating the appointment and election, compensation, powers, duties, and authority of municipal officers and employees, and authorizing abandonment of the existing form of government and adoption of a mayor-council form of government.

Be It Enacted by the Legislature of Alabama:

CHAPTER 1.

Section 1. This Act shall apply to all cities having population of not less than 200,000 nor more than 300,000, according to the most recent federal decennial census, which may now or hereafter operate under a commission form of government.

CHAPTER 2.

Section 2. The three commissioners of such city, when sitting as a board and acting within their official capacity, shall have, possess and exercise for, and in the name of and on behalf of the city all municipal powers, legislative, executive and judicial, possessed and exercised by city

governing bodies and the chief executive officers thereof under the general law, except that they shall not exercise the jurisdiction of recorders. However, the city's administrative functions shall be distributed by the board of commissioners among three departments, as follows: A department of finance and administration; a department of public safety; and a department of public works and services. The commissioner holding place number one, subject to the authority of the board of commissioners, shall be charged with the duty and responsibility of directing and supervising the department of finance and administration. The commissioner holding place number two, subject to the authority of the board of commissioners, shall be charged with the duty and responsibility of directing and supervising the department of public safety. The commissioner holding place number three, subject to the authority of the board of commissioners, shall be charged with the duty and responsibility of supervising the department of public works and services. Any function, responsibility or operation of the city not assigned by the commissioners or by act of law to one of the above named departments, shall be under the direction and supervision of the board of commissioners as a whole.

Section 3. The board of commissioners of the city shall have the power and authority to select and employ all subordinate officers and employees of the city, to assign their duties, to fix their salaries or compensation, and to dismiss or remove any employee, subject to the provisions of any civil service or merit system law applicable to the city.

Section 4. The person holding the position of place

number one on the board of commissioners shall be the presiding officer of the board of commissioners and shall act as mayor of the city for the first sixteen months of his term. During the next sixteen months the person holding the position of place number two on the board shall be the presiding officer of the board and shall act as mayor, and for the final sixteen months of the term the person holding the position of place number three on the board shall be the presiding officer thereof and act as mayor. Any commissioner who desires not to serve as presiding officer and to act as mayor may decline to do so. In the event a commissioner declines to serve as presiding officer of the board and to act as mayor, the board shall elect one of the other members thereof to serve as presiding officer and to act as mayor.

* * *

Section 30. Chapter 2 of this Act shall become effective on the first Monday in October, 1969, and the remaining parts of this Act shall take effect October 4, 1965.

Approved September 2, 1965.

Time: 5:52 P.M.

APPENDIX H

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 76-4210, 77-2042

WILEY L. BOLDEN, ET AL.,

Plaintiffs-Appellees,

v.

CITY OF MOBILE, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Alabama

NOTICE OF APPEAL TO THE SUPREME
COURT OF THE UNITED STATES

Notice is hereby given that the City of Mobile, Alabama, *et al.*, the appellants above-named, hereby appeal to the Supreme Court of the United States from the final order entered in this action March 29, 1977, affirming the judgment of the District Court and reinstating its injunction.

This appeal is taken pursuant to 28 U.S.C. §1254(2).

/s/ C.B. Arendall, Jr.
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[Filed June 19, 1978]